Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

ACADEMY OF MEDICINE OF CINCINNATI, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court that is applying the Federal Arbitration Act adopt a distinct test for the arbitrability of statutory and tort claims that considers only whether the elements of those claims reference the parties' contract and ignores whether they "touch matters" within the scope of the parties' arbitration agreement?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the Ohio Supreme Cour were plaintiffs-appellees Academy of Medicine of Cincinnati Butler County Medical Society, Luis Pagani, M.D., Pau Jennewine, M.D., Bradford H. Woodall, M.D., Willian Randall Cox, M.D., and Newton H. Bullard, M.D., an defendants-appellants United HealthCare of Ohio, Inc. Community Insurance Company d/b/a Anthem Blue Cros and Blue Shield and Aetna Health, Inc. The Ohio Suprem Court dismissed Aetna and Anthem prior to issuing it decision.

This petition is being filed on behalf of United HealthCar of Ohio, Inc. No publicly held companies own 10% or mor of United HealthCare of Ohio, Inc. United HealthCare o Ohio, Inc. is owned 100% by United HealthCare Service Inc., which in turn is owned 100% by UnitedHealth Grou Inc., a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

The Court should grant the petition to halt a growing trend in which state courts are determining the arbitrability of statutory and tort causes of action using a test that egregiously undermines the Federal Arbitration Act's policy favoring arbitration and the Court's arbitration precedent. By focusing restrictively on whether the elements of a claim reference the parties' contract, and not on whether the claims "touch matters" within the scope of the parties' arbitration agreement, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.13 (1985), the Ohio Supreme Court disregarded the intent expressed in the language of the parties' agreement to arbitrate. The court recognized that the agreement was broad, encompassing all disputes related to the parties' business relationship. Yet, the court held that state antitrust claims could not be arbitrated because the elements of those claims did not reference the contract at issue—even though the contract embodied the precise price-fixing

conspiracy alleged as the antitrust violation. Under the Ohio court's contract-reference reasoning, parties may evade their arbitration obligations through artful pleading and semantics, even when the substance of a claim unquestionably touches matters within the scope of the parties' agreement to arbitrate. The Court should determine whether the FAA and this Court's established arbitrability principles permit that result.

Ohio's dangerous distortion of federal arbitration law is compounded by Kentucky's adoption of the same test. See *Anthem Health Plans of Kentucky, Inc.* v. *Academy of Medicine of Cincinnati*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, 2004 Ky. App. LEXIS 315 (Ky. App. Oct. 29, 2004), review denied *sub nom Anthem Health Plans of Ky., Inc.* v. *Baldridge*, No. 2005-SC-0109-D (Ky. Feb. 15, 2006). Because these two cases present the same arbitrability question and, together, demonstrate a growing state-court trend, United is simultaneously filing a petition for writ of certiorari in the Kentucky case that reiterates the arguments in this petition.[1]

The Ohio and Kentucky decisions assail the fundamental premise of the federal arbitration system, which requires courts to respect and enforce contracting parties' agreements not to litigate particular categories of disputes by designating them for arbitration. In adopting a constrictive test for the arbitrability of statutory and tort causes of action, the Ohio and Kentucky courts ignored the Court's consistent directives that, under the FAA, arbitration agreements must be implemented according to their negotiated terms, that they must be interpreted with a presumption in favor of arbitrability, and that broad arbitration agreements must be faithfully enforced to effectuate their liberal scope, rendering arbitrable all dis-

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[1] See Petition for Writ of Certiorari, *United HealthCare of Ohio, Inc.* v *N. Ky. Med. Soc.* (No. 05-___).

putes with allegations that touch matters covered by the arbitration agreement. See, *e.g.*, *Mitsubishi*, 473 U.S., at 625-626 & n.13.

Moreover, the Ohio and Kentucky decisions directly conflict with the Court's explicit recognition of the arbitrability of statutory causes of action in *Mitsubishi*, 473 U.S., at 614 (international antitrust claims), *Shearson/ American Express, Inc.* v. *McMahon*, 482 U.S. 220, 238, 242-243 (1987) (RICO and §10(b) Securities Exchange Act claims), *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act claims), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401, 407 (2003) (RICO claims). And the Ohio and Kentucky decisions also specifically conflict with the Second Circuit's analysis of the arbitrability of price-fixing conspiracy claims, in particular, in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163 (CA2 2004).

Under Ohio and Kentucky's unsupportable arbitrability approach—which implements a standard previously applied by Texas and South Carolina courts as well—these courts now treat arbitration agreements differently than other state and federal courts whenever litigants bring statutory and tort claims without explicitly referencing the parties' underlying contract. This rule not only puts Ohio and Kentucky at odds with other jurisdictions, but also invites gamesmanship and forum shopping. The Court should grant the petition to protect arbitral rights and halt the end run around arbitration reflected by this growing state-court trend.

OPINIONS AND ORDERS BELOW

The Hamilton County Court of Common Pleas refused to compel arbitration or to dismiss or stay the proceedings in an unpublished order. App. 1a. The Ohio Court of Appeals affirmed the trial court in a decision reported at *Academy of Medicine of Cincinnati* v. *Aetna Health, Inc., Inc.*, 800

N.E.2d 1185 (Ohio App. 2003), *aff'd*, 842 N.E.2d 488 (Ohi 2006). See App. 6a. The Ohio Supreme Court affirmed th court of appeals in an opinion reported at *Academy o Medicine of Cincinnati* v. *Aetna Health, Inc.*, 842 N.E.2d 48 (Ohio 2006), App. 12a, and denied reconsideration in a unpublished order, App. 26a.

JURISDICTION

The Ohio Supreme Court denied a motion for reconsidera tion of its decision on April 26, 2006. App. 26a. The Cour has jurisdiction under 28 U.S.C. §1257(a). See *Cox Broad Corp.* v. *Cohen*, 420 U.S. 469, 480-483 (1975).

STATUTORY PROVISIONS INVOLVED

The enforcement provision of the Federal Arbitration Ac provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

The FAA permits parties to petition a court for an order compelling arbitration when another party does not arbitrate as required by an arbitration agreement:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing

that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." 9 U.S.C. §4.

The relevant state antitrust statutory provisions from Ohio appear in the appendix.

STATEMENT OF THE CASE

United HealthCare of Ohio, Inc., enters into provide agreements with physicians and physician groups unde which the providers agree to accept rates established in th contract when they treat individuals covered by health benefi plans insured or administered by United. These contract establish and govern the parties' relationships, including th categories of medical services, claim-reimbursement proce dures, and fee schedules. The provider agreements requir United to reimburse contracting physicians who provid covered services to members of United health plans and se out reimbursement rates for particular types of services.

Each of the respondents in this case is a party to a provide agreement with United. In addition to setting fee schedule that establish the reimbursement rates to be paid for medica services provided to patients covered by United's healtl plans, each contract also addresses the possibility of disagree ments in the course of the parties' relationship by including an expansively worded clause that mandates arbitration o "any disputes about their business relationship." See App. 9a 12a, 22a.

Five physicians practicing in the Cincinnati area and tw local medical societies, acting in a representative capacity filed this state antitrust suit against United and three othe health care companies.[2] The single-count, class-action com- plaint alleges that the reimbursement rates set by the contract containing the arbitration clauses are unreasonably low as a result of a conspiracy among the defendant managed care companies to fix prices in violation of state antitrust law App. 8a; see also OHIO REV. CODE §§1331.01, 1331.04.

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[2] In the trial court, the defendants also included Aetna Health, Inc. Anthem Blue Cross and Blue Shield, and Humana, Inc. Humana was dismissed from the case by the trial court, and Aetna and Anthem were dismissed from the case by the Ohio Supreme Court prior to the issuance of its decision.

As remedies for the alleged wrongdoing, respondents seek an injunction ordering United to cease and desist from the alleged unlawful conspiracy to depress the physician reimbursement rates reflected in the provider agreements and to modify the parties' contracts by setting reimbursement rates at reasonable levels in relation to comparable regional markets. See Pls.' Compl. 11. Respondents also seek damages for the compensation they contend should have been paid beyond the amount of the contractual reimbursement rates they received for providing services. *Ibid.*

Because the allegations center on the parties' business relationship, United and its codefendants invoked §4 of the Federal Arbitration Act, 9 U.S.C. §4, and §2711.03 of the Ohio Arbitration Act, OHIO REV. CODE §2711.03, to compel arbitration of the claims under the parties' arbitration agreements. United and the other defendants also moved to dismiss or, alternatively, to stay the proceedings pending arbitration pursuant to §3 of the FAA, 9 U.S.C. §3, and §2711.02 of the Ohio Arbitration Act, OHIO REV. CODE §2711.02.

The trial court denied the motions, holding that respondents' claims were not arbitrable because the alleged price-fixing conspiracy "does not arise out of or relate to the contracts" between the parties, "nor does it involve disputes about the parties' business relationships." App. 2a. In the trial court's view, the arbitration agreement did not include within its scope any "claims that were independent of any breach of contract." *Ibid.*

The Ohio Court of Appeals affirmed the trial court, reasoning that the antitrust claims were not arbitrable because "[t]he express elements of an antitrust claim do not depend, as a matter of law, on the provider agreements." App. 10a. The court hinged the arbitrability of a claim on whether the claim "could be maintained without reference to the individual provider agreements," and, concluding that the

antitrust claims did not reference the parties' contracts, hel that those claims fell outside the scope of the arbitratio agreements. App. 11a.

The Ohio Supreme Court granted review to determin whether the court of appeals properly considered and imple mented the federal standard for arbitrability in evaluatin respondents' state-law antitrust conspiracy claims. The cour affirmed, agreeing with the court of appeals's contract reference arbitrability test as an accurate reflection of federa law. Purporting to rely on the Sixth Circuit's decision i *Fazio* v. *Lehman Brothers*, 340 F.3d 386 (CA6 2003), th court articulated an arbitrability standard for statutory and tor causes of action that permits a court to ignore the contractua language the parties used to memorialize their agreement t arbitrate. See App. 21a.

Two justices dissented, concluding that the majority had distorted the federal standard for arbitrability, and *Fazio*, by asking solely whether respondents' claims referenced the parties' contract, rather than whether, in accordance with *Mitsubishi*, 473 U.S., at 625 n.13, the claims touch matters that fall within the scope of the parties' broad agreement to arbitrate disputes about their business relationship. See App. 23a. The dissent further noted that the majority's test marked a grave departure from the FAA and established arbitration principles:

> "[A]sking whether the action could be maintained without reference to the contract, is not consistent with either the federal policy or Ohio's policy of favoring arbitration. The appropriate federal standard is whether allegations underlying the claims 'touch matters' covered by the agreements." App. 24a.

The dissenting justices also demonstrated why the antitrust allegations necessarily fell within the scope of the parties' agreement to arbitrate:

> "[I]t is difficult to see how antitrust actions may be maintained against the HMO provider 'without reference to' the individual provider agreements . . . [that] are at the core of the [antitrust] claims, for they allegedly contain the evidence of anti-competitive conduct and financial harm. They contain the reimbursement rates allegedly implicating unlawful restraint." *Ibid.*

Accordingly, the dissent reasoned, "[t]he antitrust conspiracy claims relate to the provider contracts that contain the broad clauses requiring arbitration of any dispute 'about the business relationship' between the physicians and United Healthcare." *Ibid.*

Compounding the effect of Ohio's restrictive arbitrability approach, the Kentucky Court of Appeals adopted the same contract-reference test in a case involving another group of physicians that sued United and other managed care companies, alleging violations of Kentucky antitrust law based on the same rate-fixing theory. *Anthem*, 2004 Ky. App. LEXIS, at *7-*8. Together, the Ohio and Kentucky opinions stake out an approach to arbitrability that, as the dissenting Ohio justices observed, impermissibly deviates from the established "federal standard that inquires whether the allegations underlying the claims touch matters covered by the agreement." App. 24a.

REASONS FOR GRANTING THE WRIT

The Ohio Supreme Court's decision contravenes the FAA's strong policy favoring arbitration, as reflected in the arbitrability principles articulated by the Court, including the Court's express recognition of the arbitrability of antitrust claims. By insisting that elements of claims reference parties' underlying contracts as a prerequisite to compelling

arbitration under the FAA, the Ohio test renders nonarbitrable nearly all tort and statutory causes of action, which will almost never refer to or directly depend on an underlying contract. Thus, under the Ohio standard, now adopted by Kentucky as well, the antitrust claims in this case, and statutory and tort claims generally, must be litigated in derogation of the parties' contractual bargains to arbitrate—even under the broadest of arbitration clauses. That contract-reference approach eviscerates the protections afforded to arbitration by the FAA. It also creates an untenable circumstance in which arbitrability under the FAA is treated differently in the state courts of Kentucky and Ohio than elsewhere, encouraging litigants to forum shop to escape their arbitration commitments. Because this case presents an important federal question on which the Kentucky and Ohio decisions conflict with relevant decisions of the Court, and of the federal courts of appeals, the Court should grant the petition. SUP. CT. R. 10(b), (c).

I. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH ESTABLISHED ARBITRABILITY PRINCIPLES ARTICULATED BY THIS COURT AND THE FEDERAL COURTS OF APPEALS.

A. The National Policy Favoring Arbitration Applies Equally to State Courts.

Through the FAA, Congress "reverse[d] the longstanding judicial hostility to arbitration agreements" and "place[d] arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S., at 24; see also *Southland Corp. v. Keating*, 465 U.S. 1, 12-13 (1984). Additionally, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S., at 10.

In pursuing its clear objective of ensuring the enforcement of agreements to arbitrate, *Mitsubishi*, 473 U.S., at 625-626, Congress did not limit the applicability of its mandates to federal courts; rather, it expressly rejected the notion that enforcement of arbitration rights might depend on the forum in which they are asserted. *Southland*, 465 U.S., at 15. Indeed, the two problems against which Congress legislated were endemic to state courts: a common-law hostility toward arbitration and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. *Id.*, at 14. Congress's purpose in enacting the FAA, therefore, "was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures." *Id.*, at 13 (internal quotation marks and citation omitted).

B. Ohio's Arbitrability Standard for Non-Breach-of-Contract Claims Contravenes Fundamental Principles for Analyzing the Scope of FAA-Governed Arbitration Agreements.

The Ohio Supreme Court's test for arbitrability—whether an action can be maintained without reference to the underlying contract—conflicts with the national policy favoring arbitration that is embodied in the FAA and in the arbitration precedent of this Court and the federal courts of appeals. Coupled with Kentucky's adoption of the identical, impermissibly constrictive arbitrability standard, the Ohio decision exemplifies a state-court trend of undermining arbitration of statutory and tort claims in a manner that fundamentally guts the arbitral protections Congress enacted in the FAA, warranting the Court's intervention. See also, *e.g.*, *Aiken* v. *World Fin. Corp. of S.C.*, 623 S.E.2d 873, 875, 876 (S.C. App. 2005) (noting breadth of arbitration clause covering "all disputes, controversies or claims of any kind and nature" but refusing to compel arbitration of business-tort

claims by a borrower against a finance corporation for misus of personal information, concluding that the claims could b "maintained without reference to the contract" between th borrower and the bank); *Loy* v. *Harter*, 128 S.W.3d 397, 403 405 (Tex. App. 2004) (denying arbitration of business-tor claim for breach of fiduciary duty against a company' director and CFO after concluding that the claim "could b maintained without reference to the contract" governing hi employment and was nonarbitrable as unrelated to hi employment relationship).

Although purportedly based on language from the Sixth Circuit's decision in *Fazio*, 340 F.3d, at 386, the Ohic Supreme Court's contract-reference arbitrability standar actually conflicts with the approach of the Sixth Circui and other courts that have faithfully applied *Mitsubishi*'s requirement that parties arbitrate all claims—with nc exception for statutory or tort claims—that "touch matters' within the scope of the parties' arbitration agreements. 47 U.S., at 625 n.13 (requiring arbitration of antitrust claims) Indeed, as the Court has made clear, the FAA's "federa policy favoring arbitration . . . is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S., at 225-226 (quoting *Moses H Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1 24 (1983)). "'[W]e are well past the time when judicia suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcemen of the Act 'in controversies based on statutes.'" *McMahon* 482 U.S., at 226 (quoting *Mitsubishi*, 473 U.S., at 626-627).

The Ohio Supreme Court correctly recognized that Ohic courts may—and must—apply the federal arbitrability stan- dard when the party seeking arbitration grounds its request ir the FAA, as did United in this case. But—by creating a distinct test for arbitrability of statutory and tort causes of action—the Ohio court distorted the federal arbitrability

standard in a manner that critically deviates from the FAA's mandates and settled federal arbitration precedent.

Specifically, the Ohio Supreme Court isolated language in *Fazio* that discussed whether an action can be maintained without reference to the contract at issue, erroneously equating that inquiry with the benchmark for arbitrability. App. 19a (citing *Fazio*, 340 F.3d, at 395). As the dissent correctly observed, however, the Sixth Circuit did not limit its arbitrability test to that contract-reference inquiry but, rather, broadly held that arbitration provisions encompass claims "[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]." *Fazio*, 340 F.3d, at 395 (quoting *Genesco, Inc.* v. *T. Kalcuchi & Co., Ltd.*, 815 F.2d 840, 846 (CA2 1987)); see also App. 23a (Lanzinger, J., dissenting) ("*Fazio* recognized the true federal standard to be whether allegations 'touch matters' covered by the agreement."). Thus, the Sixth Circuit, contrary to the Ohio Supreme Court, recognized that "[e]ven real torts can be covered by arbitration clauses if the allegations underlying the claims touch matters covered by the agreement." *Fazio*, 340 F.3d, at 395 (original brackets, citation, and quotation marks omitted).

Other federal courts of appeals, consistent with the Sixth Circuit and similarly in conflict with the Ohio and Kentucky courts, have adhered to *Mitsubishi*'s touch-matters test for tort and statutory claims, requiring a "focus on the factual allegations in the complaint rather than the legal causes of action asserted . . . whatever the legal labels attached." *Genesco*, 815 F.2d, at 846 (applying the touch-matters test to determine the arbitrability of tort claims).[3] These courts of

[3] State courts, too, have recognized the propriety of applying the touch-matters test to claims other than breach of contract. See, *e.g.*, *MS Credit Ctr., Inc.* v. *Horton*, — So.2d —, No. 2004-CA-01699-SCT, 2006 WL 408415, at *6 (Miss. Feb. 23, 2006) (analyzing arbitrability of business-tort claims under the touch-matters test).

appeals have rejected attempts to evade arbitration by artfully pleading, as torts, claims relating to the parties' contractual o business relationships. See, *e.g.*, *Fyrnetics (H.K.) Ltd.* v *Quantum Group, Inc.*, 293 F.3d 1023, 1030 (CA7 2002 (rejecting attempt to avoid arbitration by casting allegation as torts of negligence and misrepresentation); *Pennzoi Exploration & Prod. Co.* v. *Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (CA5 1998) (holding that a broad arbitratio agreement "embrace[s] all disputes between the partie having a significant relationship to the contract regardless o the label attached to the dispute"); *Gregory* v. *Electro-Mech Corp.*, 83 F.3d 382, 384 (CA11 1996) ("Whether a claim fall within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the lega causes of action asserted.").[4]

The Ohio Supreme Court purported to reject artful pleading as a means to evade arbitration, App. 18a, yet its opinion promotes that detrimental result by adopting a standard tha hinges arbitrability on whether the complaint reference the contract containing the arbitration clause. The touch-matters test, by contrast, looks to the substance of the plaintiff's claims and does not have the practical effect of the Ohio decision, which effectively limits arbitration to breach-of-contract claims.

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[4] Moreover, when, as in this case, the arbitration agreement is broad, courts have declined to carve out categories of claims from the expansive scope of the parties' arbitration agreement. See *Brown* v. *ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1221 (CA11 2000) (explaining that use of the phrase "any dispute" in an arbitration agreement means that the "parties agreed to arbitrate any and all claims against each other, with no exceptions"); see also, *e.g.*, *Genesco*, 815 F.2d, at 846.

C. Ohio's Standard Conflicts with the Court's Recognition of the Arbitrability of Antitrust Claims Generally and with the Second Circuit's Analysis of Price-Fixing Conspiracy Claims Specifically.

Ohio's contract-reference test effectively excludes antitrust claims from traditional arbitrability analysis, contravening the Court's longstanding precedent that such claims—indeed, statutory claims generally—are arbitrable. See, *e.g.*, *PacifiCare*, 538 U.S., at 405-406 (RICO claims); *Gilmer*, 500 U.S., at 26 (ADEA claims); *McMahon*, 482 U.S., at 230-233 (RICO and Securities Exchange Act claims); *Mitsubishi*, 473 U.S., at 627, 632-637 (international antitrust claims).

Since *Mitsubishi*, the federal courts of appeals have uniformly held that antitrust claims are arbitrable. See, *e.g.*, *Seacoast Motors of Salisbury, Inc.* v. *DaimlerChrysler Motors Corp.*, 271 F.3d 6, 11 (CA1 2001); *Kotam Elecs., Inc.* v. *JBI Consumer Prods., Inc.*, 93 F.3d 724, 726-727 (CA11 1996) (en banc); *Nghiem* v. *NEC Elecs., Inc.*, 25 F.3d 1437, 1441-1442 (CA9 1994). Moreover, federal district courts and state courts have compelled arbitration of antitrust claims. See, *e.g.*, *N.Y. Cross Harbor R.R. Terminal Corp.* v. *Consol. Rail Corp.*, 72 F.Supp.2d 70 (EDNY 1998); *Hunt* v. *Up N. Plastics, Inc.*, 980 F.Supp. 1046 (Minn. 1997); *Crown Homes, Inc.* v. *Landes*, 27 Cal.Rptr.2d 827, 834 (Cal. App. 1994). By creating a narrow arbitrability test for statutory causes of action that, as a practical matter, will render them nonarbitrable in virtually every case, the Ohio and Kentucky courts' decisions—like prior Texas and South Carolina opinions—conflict with this Court's and the lower federal and state courts' accepted recognition that antitrust claims are arbitrable under the same conditions as other claims: when they touch matters within the scope of the parties' arbitration agreement.

Moreover, the Ohio and Kentucky opinions conflict no only generally with the "touch matters" test from *Mitsubish* and its progeny, but also specifically with the Secon Circuit's decision in *JLM Industries, Inc.* v. *Stolt-Nielse S.A.*, 387 F.3d 163 (CA2 2004), which used the touch-matter standard to determine the arbitrability of price-fixing con spiracy claims against ocean carriers whom the plaintiff alleged exploited their market power to fix worldwid shipping rates. *Id.*, at 167-168, 172-173. Analyzing precisel the type of dispute that this case presents, the Second Circui reversed the trial court's ruling that the claims wer nonarbitrable because they could be proven without reliance on the parties' contracts. *Id.*, at 168.

The Second Circuit acknowledged that the price-fixing conspiracy allegations "rest[ed] on factual allegations whic concern matters beyond the making of a particular contrac between the parties and the performance of its terms" and therefore "will not focus exclusively 'upon the parties' conduct under the terms of the charter.'" *Id.*, at 175. Nonetheless, the court reasoned that the plaintiffs could not have suffered the damages from the alleged price fixing had they not entered into the contracts, "each of which specifies price terms which are variously characterized in the amended complaint as 'artificially high' and as 'overpayments.'" *Ibid.* Accordingly, the price-fixing claims, though alleged as extra-contractual, arose out of the contracts and fell within the parties' broad arbitration agreements. *Id.*, at 176 (holding that antitrust disputes "unquestionably involve a core issue of the contracts between the parties—allegations that the price terms set forth in those contracts have been artificially inflated as a result of the price-fixing conspiracy").[5]

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[5] A district court within the Second Circuit similarly applied the touch-matters standard in determining the arbitrability of claims alleging that banks engaged in price fixing regarding currency conversion fees when cardholders conducted foreign currency transactions with their credit

Under *JLM*'s reasoning, the price-fixing allegations in this case would fall plainly within the scope of the parties' arbitration agreement, which the Ohio Supreme Court acknowledged was broad. App. 17a. The court, however, violated fundamental arbitrability principles by paying lip service to, but disregarding in practice, the requirement that courts construe arbitration agreements in favor of arbitration. App. 16a; see, *e.g.*, *Mitsubishi*, 473 U.S., at 625; *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985). Under the FAA, any doubts about arbitrability must be resolved in favor of coverage, and arbitration must be compelled unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 589 (1960); see also *Moses H. Cone*, 460 U.S., at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

Despite its duty to construe the United arbitration agreements broadly under the Court's precedent, the Ohio Supreme Court's impermissibly constrictive scope analysis defeated the parties' agreement to arbitrate all disputes "about their business relationship." See App. 12a, 17a. Under a proper analysis, as the dissent observed, respondents' price-fixing conspiracy allegations plainly touch matters concerning the parties' business relationship because the parties' contracts "allegedly contain the evidence of anti-competitive conduct and financial harm" and "the reimbursement rates allegedly implicating unlawful restraint." App. 24a. Accordingly, the dissent reasoned, "[t]he antitrust conspiracy claims relate to

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cards and the fixed prices appeared on the credit card accounts. *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385, 406, 410 (SDNY 2003). The court held that the claims were arbitrable because the terms of plaintiffs' use of the credit-card accounts were governed by the cardholder agreements containing the arbitration clause. *Ibid.*

the provider contracts that contain the broad clauses requiring arbitration of any dispute 'about the business relationship between the physicians and United Healthcare." *Ibid.* Indeed, the dissent's analysis closely mirrors that of the Second Circuit in *JLM.* 387 F.3d, at 175-176.

Because the price-fixing conspiracy allegations necessarily center on the parties' business relationship, the Ohio Supreme Court's refusal to compel arbitration and its creation of a distinct, narrow arbitrability standard for statutory and tort claims reflect a revived judicial hostility to arbitration that is compounded by Kentucky's adoption of the identical restrictive standard. In light of this state-court trend—which includes similar holdings from Texas and South Carolina[6]—the Court should grant the petition to clarify whether, as *Mitsubishi* and *McMahon* indicated, 482 U.S., at 225-226; 473 U.S., at 626-627, the FAA, the national policy favoring arbitration, and this Court's directive to faithfully enforce the negotiated terms of parties' arbitration agreements apply equally to motions to compel arbitration of statutory claims or whether, as Ohio and Kentucky concluded, courts should enforce arbitration rights only when the elements of such claims expressly reference the contract in question.

II. THE OHIO SUPREME COURT'S HOSTILITY TO ARBITRATION INVITES GAMESMANSHIP AND FORUM SHOPPING.

By focusing on the formal elements of claims to the exclusion of textual analysis of parties' arbitration agreements, the Ohio Supreme Court's restrictive standard improperly encourages gamesmanship by tying the scope-of-arbitrability determination to the formalities of a plaintiff's pleadings, which can be creatively drafted to avoid reference to the relevant contract and thus permit plaintiffs to evade

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[6] See, *e.g.*, *Aiken*, 623 S.E.2d, at 875-876; *Loy*, 128 S.W.3d, at 403-405.

arbitration. Rather than ensuring the enforcement of valid arbitration agreements, as Congress mandated in the FAA, the Ohio standard creates a safe harbor for parties who wish to breach their obligation to arbitrate, authorizing plaintiffs to do precisely what other courts have forbidden: escape arbitration commitments by recasting a dispute in tort or as a statutory violation. See, *e.g.*, *Fazio*, 340 F.3d, at 395 (holding that a party cannot avoid arbitration simply by framing its action in tort); *Fyrnetics*, 293 F.3d, at 1030 (rejecting attempt to avoid arbitration by casting allegations as torts of negligence and misrepresentation). In other words, the decision effectively creates a zone of nonarbitrability for plaintiffs sufficiently sophisticated to plead their claims as statutory or tort claims, rather than directly as contractual violations.

This dangerous erosion of arbitration rights, exacerbated by Kentucky's adoption of the Ohio standard, will encourage forum shopping and generate jurisdictional disputes when parties seeking to escape arbitration obligations target Ohio and Kentucky state courts, while those wishing to enforce arbitration agreements attempt to be heard in federal court or other state courts.[7] The Court should grant the petition to reaffirm that arbitrability depends on the language of parties' agreements, not the forum chosen.

Additionally, by departing from traditional scope analysis in favor of a new contract-reference test, the Ohio and Kentucky decisions will create confusion and uncertainty over the availability of arbitration for statutory and tort claims. For countless contracts containing broad arbitration clauses like respondents' agreements with United, the Ohio and Kentucky decisions will upset parties' settled, and

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[7] South Carolina and Texas courts' implementation of the same arbitrability test makes additional inroads on arbitration rights and further demonstrates the need for review of the arbitrability standard for non-contractual claims. See, *e.g.*, *Aiken*, 623 S.E.2d, at 875-876; *Loy*, 128 S.W.3d, at 403-405.

reasonable, expectations that courts will honor their carefully negotiated agreements. By effectively excluding statutory and tort claims from arbitration regardless of the language parties include in their arbitration agreements, the Ohio and Kentucky *opinions also introduce unavoidable unpredictability* for parties negotiating contracts that reflect broad agreements to arbitrate but rely on Ohio or Kentucky law. Indeed, these decisions may deter parties seeking broad arbitration agreements from entering into agreements governed by Ohio or Kentucky law.

The Kentucky and Ohio opinions, unless addressed by the Court, stand as an open invitation to other courts that have never fully embraced arbitration and now have ammunition to disparately treat motions to compel arbitration of claims other than breach of contract. This trend dangerously threatens the FAA's arbitral protections and the strong national policy favoring arbitration in two significant respects. First, it will undermine Congress's primary goal of permitting parties to avoid litigation by honoring their agreements not to litigate certain—or all—disputes between them. See, *e.g.*, *Southland*, 465 U.S., at 7 (noting that one party's avoidance of arbitration may lead to protracted litigation, "one of the very risks the parties, by contracting for arbitration, sought to eliminate"). Second, these opinions, if unreviewed, will signal that no consequences lie for a court that egregiously deviates from Congress's clearly expressed will in enacting the FAA. See *supra* Part I.A.

Because the Ohio Supreme Court's arbitrability standard, and its adoption by Kentucky, undermines the national policy favoring arbitration, dramatically departs from established federal precedent, and eviscerates parties' contractual rights while also establishing an incentive for litigants to use the Ohio and Kentucky courts in a manner inconsistent with the FAA, the Court should grant the petition and determine whether statutory claims must be arbitrated only when they

reference the underlying contract or whether, consistent with arbitrability principles governing all other categories of claims, courts must compel arbitration when allegations touch matters within the scope of the parties' arbitration agreement.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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May 16, 2006

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[Entered January 31, 2003]

Case No. A 0204947
(Judge Davis)

ACADEMY OF MEDICINE OF CINCINNATI, *et al.*,
Plaintiffs,

vs.

AETNA HEALTH, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

This cause came to be heard on the following motions:

- Anthem Blue Cross and Blue Shield's Motion to Compel Arbitration, and to Dismiss or Stay Proceedings, Including a Stay of Discovery (Oral Argument Requested);
- Defendant Aetna Health, Inc.'s Motion to Compel Arbitration and to Stay the Action Pending Arbitration and Motion to Stay Discovery (Oral Argument Requested);
- Humana Health Plan of Ohio, Inc.'s Motion to Compel Arbitration, and to Stay Discovery Pending Resolution of the Arbitration Issue and Motion to Dismiss;
- United Healthcare of Ohio, Inc.'s Motion to Compel Arbitration and to Dismiss or Stay Proceedings, Including Discovery (Oral Argument Requested); and
- Defendants' Joint Alternative Motion to Dismiss and to Stay Discovery (Oral Argument Requested).

Collectively, the foregoing motions are referred to herein as "Defendants' Motions."

This Court FINDS that:

The Defendants' Motions are not well taken and are therefore OVERRULED.

A. Defendants' Motions to Compel Arbitration and Motions to Dismiss or Stay Proceedings, Including Discovery.

The Plaintiffs allege that the Defendants engaged in a conspiracy of price fixing. This dispute does not arise out of or relate to the contracts between the Plaintiffs and Defendants, nor does it involve disputes about the parties' business relationships. The parties never agreed to arbitrate claims that were independent of any breach of contract.

In this case, arbitration is a matter of contract. Considering one party, i.e., the Plaintiffs, is objecting thereto, the court shall not compel an arbitration for a dispute the parties did not agree, in advance, to arbitrate.

B. Defendants' Joint Alternative Motion to Dismiss and to Stay Discovery.

The association Plaintiffs, The Academy of Medicine of Cincinnati and the Butler County Medical Society meet the test set forth in *Hunt v. Washington State Apple Adver. Comm'n* (1977), 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L. Ed.2d 383 for standing as party plaintiffs in the case. It is clear that (1) their members would otherwise have standing to sue in their own right, (2) the interest they seek to protect is germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of their individual members.

The Valentine Act does apply to Plaintiffs' claims. The Valentine Act does not only apply to tangible goods but may

apply to intangibles, such as insurance and services. Therefore, the Valentine Act applies, generally, to trade or commerce, such as physician's reimbursement rates.

The Valentine Act does provide a private right of action for injunctive relief and the court does have the authority to grant the injunctive relief requested by the Plaintiff's, if proven, without having to engage in setting reimbursement rates.

Realizing some of these issues may be subject to appeal, the Court finds that there is no just reason for delay.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, THAT:

Defendants' Motions are overruled.

Pursuant to Ohio R.Civ.P. 12(A)(2), Defendants are not required to respond to the Amended Complaint until fourteen (14) days after the date this Judgment Entry is entered.

This matter is rescheduled for a status report on February 26, 2003 at 8:30 a.m.

IT IS SO ORDERED.

Jan. 31, 2003
Date

/s/
David P. Davis, Judge
Hamilton County Court of
Common Pleas

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

[Entered November 21, 2003

APPEAL NOS. C-030109
C-030110
C-030111
TRIAL NO. A-0204947

ACADEMY OF MEDICINE OF CINCINNATI, LUIS PAGANI, M.D., BUTLER COUNTY MEDICAL SOCIETY, PAUL JENNEWINE, M.D., BRADFORD H. WOODALL, M.D., WILLIAM RANDALL COX, M.D., and NEWTON H. BULLARD, M.D.,
Plaintiffs-Appellees,

vs.

AETNA HEALTH, INC., COMMUNITY INSURANCE COMPANY d/b/a ANTHEM BLUE CROSS AND BLUE SHIELD, and UNITED HEALTHCARE OF OHIO, INC.,
Defendants-Appellants,

and

HUMANA HEALTH PLAN OF OHIO, INC.,
Defendant.

DECISION

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 21, 2003

Strauss & Troy, Richard S. Wayne, Joseph J. Braun, and Barrett & Weber, LPA, and *Michael R. Barrett, and Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Terrence L. Goodman* and *Jean M. Geoppinger*, for Plaintiffs-Appellees,

Hahn Loeser & Parks, LLP, and *Robert J. Fogarty,* for Defendant-Appellant Aetna Health, Inc,

Frost Brown Todd, LLC, and *James R. Adams*, for Defendant-Appellant Community Insurance Company d/b/a Anthem Blue Cross & Blue Shield,

Thompson Hine and *Stephen J. Butler*, for Defendant-Appellant United Healthcare of Ohio, Inc.

Please note: We have sua sponte removed this case from the accelerated calendar.

Per Curiam.

{¶1} Plaintiffs-appellees, medical doctors practicing i the greater Cincinnati, Ohio, area and two nonprofit medica societies representing the doctors, sued defendant-appellants Aetna Health, Inc. ("Aetna"), Anthem Blue Cross and Blu Shield ("Anthem"), and United Healthcare of Ohio, Inc ("United"), three managed health-care organizations ("th HMOs"), for violations of the antitrust provisions in Ohio' Valentine Act, R.C. Chapter 1331. The doctors alleged tha the HMOs had conspired to fix and lower the insuranc reimbursement rates paid to hospitals and medical practi- tioners in the geographic region consisting of the followin counties in Ohio: Hamilton, Clermont, Warren and Butler. I response to the complaint, each HMO moved to stay the proceedings in the trial court and to compel arbitration of the antitrust claims. The trial court denied the motions, statin that the dispute (conspiracy to engage in price fixing) did no arise out of or relate to the provider agreements between the parties, and that the "parties [had] never agreed to arbitrate claims that were independent of any, breach of contract." Each HMO has timely appealed that decision.[2] We have consolidated the appeals for purposes of this decision.

{¶2} Aetna, Anthem and United each assign as error the trial court's denial of their motions to compel arbitration and to stay proceedings in the trial court. Prior to discussing these assignments of error, we note that all the parties agree that a valid arbitration clause existed in each of the HMOs' contracts with the plaintiff doctors. The similarly worded

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[1] Defendant Humana Health Plan of Ohio, Inc., ("Humana") originally filed a notice of appeal and an appellate brief in connection with this case. Because Humana voluntarily dismissed its appeal after oral arguments were held, we do not address its assignments of error.

[2] Pursuant to R.C. 2711.02(C), an order that denies a stay of the trial of any action pending arbitration is a final order that may be appealed.

arbitration or alternative-dispute-resolution clause contained in each of the HMOs' contracts with the regional hospitals and medical practitioners stated that "any disputes arising out of or relating" to the provider agreement or "business relationship" had to be resolved through arbitration, mediation or some form of alternative dispute resolution. The HMOs argue that the antitrust claims were within the scope of the arbitration provisions in the provider agreements. We disagree and thus affirm the judgment of the trial court.

{¶3} As this court has outlined before, "the Ohio Supreme Court has adopted four rules, common to both state and federal courts, for reviewing decisions concerning a dispute's arbitrability: (1) that 'arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit'; (2) that the question whether a particular claim is arbitrable is one of law for the court to decide, (3) that when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying claim; and (4) that when a contract contains an arbitration provision, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[3]

{¶4} Here, the parties' dispute centers on whether the HMOs conspired and/or colluded to set reimbursement rates in this region that were lower than the "prevailing reimbursement rates in other comparable Ohio health care markets

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[3] *Cohen v. Painewebber, Inc.*, 1st Dist. No. C-010312, 2002-Ohio-196, *citing Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 665-666, 687 N.E.2d 1351, citing *AT & T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 643-650, 106 S.Ct. 1415, quoting *Steelworkers v. Am. Mfg. Co.* (1960), 363 U.S. 564, 80 S.Ct. 1343.

such as Dayton, Columbus and Cleveland." In determining whether this claim was within the scope of the arbitration agreements, "a proper method of analysis here is to ask if [this] action could be maintained without reference to the [provider agreement] or [business] relationship at issue. If it could, it is likely outside the scope of the arbitration agreement."[4]

{¶5} After reviewing the complaint and the remainder of the record, we conclude that the doctors' antitrust claim could be maintained without reference to their individual provider agreements. To maintain an antitrust claim pursuant to R.C. Chapter 1331, the doctors have to prove that two or more persons came together to illegally concentrate a particular business into the hands of a few for the purpose of controlling prices, and that injury resulted from that restraint of trade.[5] The express elements of an antitrust claim do not depend, as a matter of law, on the provider agreements between the individual doctors and HMOs.

{¶6} The doctors' allegations in their complaint – (1) that the HMOs conspired and/or colluded with one another to illegally lower and fix the reimbursement rates for medical procedures to medical practitioners in the region; (2) that this anticompetitive behavior caused a decline in the number of doctors willing to practice medicine here, which resulted in the number of hospitals and hospital beds available for patient care dropping by nearly fifty percent and a decline in the quality of health care available for the consumer; and (3) that the HMOs' anti-competitive behavior precipitated a drop in physicians' salaries in the area – neither relied on nor

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[4] *Fazio v. Lehman Brothers, Inc.* (C.A.6, 2003), 340 F.3d 386, 395, citing *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, (C.A.5, 1998), 141 F.3d 243, 2513-51.

[5] See *Schweizer v. Riverside Methodist Hospitals* (1996), 108 Ohio App.3d 539, 543, 671 N.E.2d 312.

referred to a contract or a provider agreement between the doctors and the HMOs. Instead, the antitrust claim was based upon a statutory remedy the legislature has provided to persons harmed by illegal price fixing. The allegations that the HMOs, which controlled a majority of the health-care market in this region, colluded to fix reimbursement rates to medical practitioners arose out of actions that occurred prior to the existence of the underlying provider agreements or business relationships between the doctors and HMOs. The allegations did not even presume the existence of an underlying provider agreement.

{¶7} Because the doctors' cause of action could be maintained without reference to the individual provider agreements, we hold that the antitrust claims were not subject to the arbitration provision in the provider agreements. Accordingly, the trial court did not err in refusing to compel arbitration. Pursuant to this holding, the issue of whether the trial court erred in failing to stay the proceedings is now moot. The HMOs' assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

SUNDERMANN, P.J., HILDEBRANDT and WINKLER, JJ.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

ACADEMY OF MEDICINE OF CINCINNATI ET AL., APPELLEES, *v.* AETNA HEALTH, INC. ET AL.; UNITED HEALTHCARE OF OHIO, APPELLANT.
[Cite as *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657.]

Contracts—Arbitration clause—Antitrust claims—Standard of review for determining whether cause of action is within scope of contract clause requiring arbitration of disputes.

(No. 2004-0001—Submitted February 2, 2005—Decided March 1, 2006.) APPEAL from the Court of Appeals for Hamilton County, Nos. C-030109, C-030110, and C-03011, 155 Ohio App.3d 310, 2003-Ohio-6194.

PFEIFER, J.

Factual and Procedural Background

{¶ 1} Plaintiffs-appellees, Academy of Medicine of Cincinnati, Butler County Medical Society, Luis Pagani, M.D., Paul Jennewine, M.D., Bradford H. Woodall, M.D., William Randall Cox, M.D., and Newton H. Bullard, M.D., allege that defendant-appellant, United Healthcare of Ohio ("United"), one of the largest providers of group health-insurance policies in Hamilton, Warren, Clermont, and Butler Counties, engaged in a conspiracy with other such providers to maintain artificially low reimbursement rates paid to physicians in the region in violation of the antitrust provisions of the Valentine Act, R.C. Chapter 1331.

{¶ 2} In response to appellees' complaint filed in Hamilton County Common Pleas Court, appellant moved to stay the trial court proceedings and compel arbitration of the antitrust claims. The motion was based on the arbitration clause in the physician-appellees' provider agreements with appellant. The clause requires binding arbitration of disputes "about [the parties'] business relationship."

{¶ 3} The trial court denied the motion to stay and to compel arbitration, reasoning that since the plaintiffs alleged a conspiracy of price fixing by the defendant and other providers, that dispute "[did] not arise out of or relate to the contracts between the Plaintiffs and Defendant[ ], nor [did] it involve disputes about the parties' business relationships." The court found that "[t]he parties never agreed to arbitrate claims that were independent of any breach of contract."

{¶ 4} The court of appeals affirmed the trial court, finding that the appellees' antitrust claims were not within the scope of the arbitration provisions in the provider agreements. Relying on this court's decision in *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 687 N.E.2d 1352, the appellate court set forth the test for determining the arbitrability of a given dispute:

{¶ 5} " '[T]he Ohio Supreme Court has adopted four rules, common to both state and federal courts, for reviewing decisions concerning a dispute's "arbitrability": (1) that "arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit"; (2) that the question whether a particular claim is arbitrable is one of law for the court to decide; (3) that when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying claim; and (4) that when a "contract contains an arbitration provision, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " ' " 155 Ohio App.3d 310, 2003-Ohio-6194, 800 N.E.2d 1185, ¶ 12, quoting *Cohen v. PaineWebber, Inc.*, Hamilton App. No. C-010312, 2002 WL 63578, quoting *Council of Smaller Enterprises*, 80 Ohio St.3d at 665-666, 687 N.E.2d 1352, quoting *AT & T Technologies,*

Inc. v. Communications Workers of Am. (1986), 475 U.S 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648.

{¶ 6} This case revolves around the application of the first rule enunciated in *Council of Smaller Enterprises*, i.e. whether the parties agreed to submit the dispute at issue to arbitration. In determining whether a claim based upon an alleged conspiracy to set artificially low reimbursement rates was within the scope of the arbitration agreements between the parties in this case, the appellate court relied upon a federal case, *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386. In *Fazio*, the Sixth Circuit Court of Appeals held that "a proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." Id. at 395, citing *Ford v. NYLCare Health Plans of Gulf Coast, Inc.* (C.A.5, 1998), 141 F.3d 243, 250-251.

{¶ 7} Applying *Fazio*, the appellate court concluded that "the doctors' antitrust claim could be maintained without reference to their individual provider agreements." 155 Ohio App.3d 310, 2003-Ohio-6194, 800 N.E.2d 1185, ¶ 5. The court found that "[t]he allegations that the HMOs, which controlled a majority of the health-care market in this region, colluded to fix reimbursement rates to medical practitioners arose out of actions that occurred prior to the existence of the underlying provider agreements or business relationships between the doctors and HMOs. The allegations did not even presume the existence of an underlying provider agreement." Id. at ¶ 6.

{¶ 8} Since the court found that the doctors' cause of action could be maintained without reference to the individual provider agreements, it held that the antitrust claims were not subject to the arbitration provision in the provider agreements.

{¶ 9} Appellant appealed. This court granted appellant's jurisdictional motion on a limited basis, ordering briefing only on the following issue: "In determining whether a cause of action is within the scope of an arbitration agreement, may a state court in Ohio base that determination on a federal standard that inquires whether the 'action could be maintained without reference to the contract or relationship at issue?' *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386, 395, citing *Ford v. NYLCare Health Plans of Gulf Coast, Inc.* (C.A.5, 1998), 141 F.3d 243, 250-251." 102 Ohio St.3d 1407, 2004-Ohio-1860, 806 N.E.2d 559.

Law and Analysis

{¶ 10} "Ohio and federal courts encourage arbitration to settle disputes," *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500, 692 N.E.2d 574, and Ohio has generally relied at least in part on federal law in developing its own jurisprudence. This court enunciated the four principles that guide determinations of arbitrability in *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 687 N.E.2d 1352, relying heavily on *AT & T Technologies*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648. This court held:

{¶ 11} "The first principle is that ' "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." * * * This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration.' *AT & T Technologies*, 475 U.S. at 648-649, 106 S.Ct. at 1418, 89 L.Ed.2d at 655, quoting [*United Steelworkers of Am. v.*] *Warrior & Gulf* [*Navigation Co.* (1960)], 363 U.S. [574] at 582, 80 S.Ct. [1347] at 1353, 4 L.Ed.2d [1409] at 1417.

{¶ 12} "The second principle is that 'the question o arbitrability—whether a[n] * * * agreement creates a duty fo the parties to arbitrate the particular grievance—is undeniabl an issue for judicial determination. Unless the parties clearl and unmistakably provide otherwise, the question of whethe the parties agreed to arbitrate is to be decided by the court not the arbitrator.' *Id.*, 475 U.S. at 649, 106 S.Ct. at 1418, 8 L.Ed.2d at 656.

{¶ 13} "The third rule is, 'in deciding whether the partie have agreed to submit a particular grievance to arbitration, court is not to rule on the potential merits of the underlyin claims.' *Id.*, 475 U.S. at 649, 106 S.Ct. at 1419, 89 L.Ed.2d a 656.

{¶ 14} "The fourth principle is that 'where the contrac contains an arbitration clause, there is a presumption o arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." ' *Id.*, 475 U.S. at 650, 106 S.Ct. at 1419, 89 L.Ed.2d at 656, quoting *Warrior & Gulf*, *supra*, 363 U.S. at 582-588, 80 S.Ct at 1353, 4 L.Ed.2d at 1417." *Council of Smaller Enterprises*, 80 Ohio St.3d at 665-666, 687 N.E.2d 1352.

{¶ 15} Thus, with its reliance on federal precedent, this court has itself abundantly shown that a state court may rely on a federal standard in applying Ohio law on the issue o arbitrability. However, that standard must be consistent with Ohio law and must reflect a correct statement of the applicable federal jurisprudence. The appellate court's reliance on *Fazio* is appropriate in both regards.

{¶ 16} The only issue before us is whether the court of appeals employed a proper test for determining the scope of the arbitration clause at issue, i.e., whether the parties agreed

to submit this dispute to arbitration. "An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected." *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859.

{¶ 17} We look first to whether the arbitration clause itself or the statute at issue contains limitations as to arbitrability. Had the parties removed statutory claims from the scope of the arbitration provision, or had the General Assembly "evinced an intention to preclude a waiver of judicial remedies for the statutory rights" created by the Valentine Act, appellee's claims could not have been within the scope of the arbitration agreement. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444. However, the arbitration clause at issue does not remove statutory claims from the scope of the agreement, and the Valentine Act does not preclude a waiver of judicial remedies for the rights it creates.

{¶ 18} Our next consideration is whether the arbitration clause limits itself only to certain aspects of the underlying contract. "To determine whether the claims asserted in the complaint fall within the scope of an arbitration clause, the Court must 'classify the particular clause as either broad or narrow.' *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir.2001). An arbitration clause that contains the phrase 'any claim or controversy arising out of or relating to the agreement' is considered 'the paradigm of a broad clause.' *Collins & Aikman Prods. Co. v. Bldg. Sys. Inc.*, 58 F.3d 16, 20 (2d Cir.1995)." *ADR/JB, Corp. v. MCY III, Inc.* (E.D.N.Y.2004), 299 F.Supp.2d 110, 114. The arbitration provision in this case purports to cover any disputes about the parties' business relationship and must be considered a broad clause.

{¶ 19} Arbitration is not limited to claims alleging a breach of contract, and creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision. The overarching issue is whether the parties agreed to arbitrate the issue. *Mitsubishi*, 473 U.S. at 626, 105 S.Ct. 3346, 87 L.Ed.2d 444. "There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights." Id. In *Mitsubishi*, the court found that an agreement to arbitrate antitrust claims is not void as against public policy. Id. at 632-636, 105 S.Ct. 3346, 87 L.Ed.2d 444.

{¶ 20} *Mitsubishi* does not make every antitrust claim arbitrable between parties to an arbitration agreement. Statutory claims, including antitrust claims, are neither per se arbitrable or not arbitrable. Those claims must undergo the analysis that every other claim faces: whether the parties agreed to arbitrate the issue. In *Mitsubishi*, the lower court had found (and the plaintiff did not dispute on appeal) that each element in the mix of allegations that yielded the plaintiff's antitrust claim individually implicated a provision of the sales procedure agreement between the plaintiff and Mitsubishi. *Id.* at 622, 105 S.Ct. 3346, 87 L.Ed.2d 444, fn. 9.

{¶ 21} In *Coors Brewing Co. v. Molson Breweries* (C.A.10, 1995), 51 F.3d 1511, the court concluded that although the arbitration clause at issue encompassed antitrust claims generally, some of the antitrust causes of action Coors Brewing Company brought against Molson Breweries of Canada Limited were outside the scope of the contract between the two companies. In that case, Coors had a licensing agreement under which Molson would brew and distribute Coors products in Canada. Later, Miller Brewing Company entered into a partnership with Molson, making Molson the exclusive distributor of Miller products in Canada, and Miller the exclusive distributor of Molson products in the United States. Coors alleged, among other

things, that the Miller-Molson alliance was a combination in restraint of trade, lessening competition in the United States and North American beer markets. The *Coors* court found that Coors could litigate any antitrust claims against Molson not related to its licensing agreement, just as anyone else with standing could. Id. at 1517. The existence of a contractual relationship between Coors and Molson did not mean that every conceivable claim between the two was arbitrable.

{¶ 22} The *Coors* court points out the absurdity of a contrary holding:

{¶ 23} "A dispute within the scope of the contract is still a condition precedent to the involuntary arbitration of antitrust claims. * * * A contrary reading of *Mitsubishi* not only ignores the facts of that case, but also could lead to absurd results. For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship." 51 F.3d at 1516.

{¶ 24} The *Fazio* test applied by the court below helps determine whether the contractual relationship between parties is irrelevant or controlling. Since courts must sift through pleadings to determine whether a cause of action labeled as a tort or statutory claim is essentially a cause of action based upon the contract, we agree with *Fazio* that "a proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue." Id., 340 F.3d at 395.

{¶ 25} The facts of *Fazio* itself demonstrate that its rule is consistent with a policy favoring arbitration. In *Fazio*, a Cleveland stockbroker, Frank Gruttadauria, had misappro-

priated at least $54 million of his clients' money. He had sen falsified statements to clients overstating the value of thei accounts, covering up significant losses. When clients with drew money from their inflated accounts, Gruttadauria woul take money from other clients' accounts to make payments. Eventually, Gruttadauria's clients' accounts had a paper valu of $278 million, but an actual value of only $1.8 million.

{¶ 26} His clients brought causes of action against th brokerage houses for which he had worked. They alleged numerous securities laws violations, including theft, as well as churning, unauthorized trading, and excessive risk taking. The brokerage houses sought to compel arbitration. All of th plaintiffs were subject to broadly worded arbitration clauses.

{¶ 27} The lower court found that the allegation of theft placed the dispute outside the scope of the arbitration provision because Gruttadauria's conduct was so beyond what is expected of a broker that it could not have been within the reasonable contemplation of the plaintiffs when they signed their agreements.

{¶ 28} The appellate court, however, found that the fraudulent activities were a violation of the account agreements and arose out of activities contemplated by those agreements. "The lawsuit by necessity must describe why Gruttadauria was in control of the plaintiffs' money and what the brokerage houses' obligations were. The plaintiffs therefore cannot maintain their action without reference to the account agreements, and accordingly, this action is covered by the arbitration clauses." Id., 340 F.3d at 395.

{¶ 29} The *Fazio* test does not act as a detriment to arbitration. It functions as a tool to determine a key question of arbitrability—whether the parties agreed to arbitrate the question at issue. It prevents the absurdity of an arbitration clause barring a party to the agreement from litigating any matter against the other party, regardless of how unrelated to

the subject of the agreement. It allows courts to make determinations of arbitrability based upon the factual allegations in the complaint instead of on the legal theories presented. It also establishes that the existence of a contract between the parties does not mean that every dispute between the parties is arbitrable.

{¶ 30} We find that the *Fazio* test is consistent with Ohio law and is not contrary to federal law on the issue of arbitrability. We therefore find that in determining whether a cause of action is within the scope of an arbitration agreement, a state court in Ohio may base that determination on a federal standard that inquires whether the action could be maintained without reference to the contract or relationship at issue.

Judgment affirmed.

MOYER, C.J., RESNICK, O'CONNOR and O'DONNELL, JJ., concur.

LUNDBERG STRATTON and LANZINGER, JJ., dissent.

LANZINGER, J., dissenting.

{¶ 31} I agree that a state court may determine whether a claim is within an arbitration agreement using a federal standard as long as that standard itself is stated correctly and is consistent with Ohio law. Yet because, in my view, the appellate court mischaracterized the federal standard and, by holding that the antitrust claims were not subject to arbitration, minimized Ohio's policy favoring arbitration, I respectfully dissent.

{¶ 32} The majority twice cites the four rules of *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 687 N.E.2d 1352, relating to when arbitration may be compelled, but focuses solely on the first point, the parties' intent to arbitrate. Although indeed the parties cannot

be forced to arbitrate unless they have agreed to do so, ir Ohio there is a presumption of arbitrability when a contrac contains an arbitration clause, especially when the clause is broad in scope. Id. at 666-667, 687 N.E.2d 1352. The clause requiring arbitration or alternative dispute resolution contained within the United Healthcare of Ohio provider agreements is broad, covering as it does any dispute "abou [the parties'] business relationship."

{¶ 33} The case relied on by the appellate court, *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386, determined that allegations of securities violations were within the scope of an agreement containing an arbitration clause even though the thefts themselves were unrelated to what was expected of a broker. Because the theft claims arose out of activities contemplated by the account agreements, they were subject to arbitration. Id. at 395.

{¶ 34} *Fazio*'s suggestion that courts ask whether the claim could be maintained without reference to the agreements is a preliminary rather than a defining matter and should be put into context within the entire paragraph:

{¶ 35} "District courts have the authority to decide, as a threshold matter, whether an issue is within the scope of an arbitration agreement. *Stout [v. J.D. Byrider* (C.A.6, 2000)], 228 FM [709] at 714. A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250-51 (5th Cir. 1998) (applying Texas arbitration law under a choice of law provision). Torts may often fall into this category, but merely casting a complaint in tort does not mean that the arbitration provision does not apply. *Fyrneties (Hong Kong) Ltd, v. Quantum Group, Inc.*, 293 F.3d 1023, 1030 (7th Cir.2002). *Even real torts can be covered by arbitration clauses 'if the allegations underlying the claims "touch*

matters" covered by the (agreement].' Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 846 (2d Cir.1987). We are, however, aware of the Supreme Court's warning against 'forcing unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.' *First Options [of Chicago, Inc. v. Kaplan* (1995)], 514 U.S. [938] at 945 [115 S.Ct. 1920, 131 L.Ed.2d 985]." (Emphasis added.) *Fazio*, 340 F.3d at 395.

{¶ 36} Thus, *Fazio* recognized the true federal standard to be whether allegations "touch matters" covered by the agreement. Not only tort claims may be covered by an agreement. Statutory antitrust claims have been compelled to face arbitration. As the United States Supreme Court noted in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444, "the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability." Id. at 625, 105 S.Ct. 3346, 87 L.Ed.2d 444, fn. 13.

{¶ 37} Federal policy strongly favors enforcement of arbitration agreements. See Section 2, Title 9, U.S.Code. In fact, in light of this strong federal policy, the existence of a broad agreement to arbitrate creates a presumption of arbitrability that may be overcome only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 583-584, 80 S.Ct 1347, 4 L.Ed.2d 1409. See, also, *Smith/Enron Cogeneration Ltd. Partnership v. Smith Cogeneration Internatl., Inc.* (C.A.2, 1999), 198 F.3d 88, 99; *Air Line Pilots*

Assn. v. Fed. Express Corp. (C.A.D.C.2005), 402 F.3d 1245 1248; *Washington Square Securities, Inc. v. Aune* (C.A.4 2004), 385 F.3d 432, 436; *Inlandboatmens Union of the Pacific v. Dutra Group* (C.A.9, 2002), 279 F.3d 1075, 1078.

{¶ 38} Even if we were to apply the standard mistakenly used by the appellate court, it is difficult to see how antitrust actions may be maintained against the HMO provider "without reference to" the individual provider agreements. *Fazio*, 340 F.3d at 395. The provider agreements constitute the alleged anticompetitive instruments that give the physicians standing to sue. See *Schweizer v. Riverside Methodist Hosps.* (1996), 108 Ohio App.3d 539, 543-544, 671 N.E.2d 312. They are at the core of the Valentine Act claims, for they allegedly contain the evidence of anti-competitive conduct and financial harm. They contain the reimbursement rates allegedly implicating unlawful restraint. The antitrust conspiracy claims relate to the provider contracts that contain the broad clauses requiring arbitration of any dispute "about the business relationship" between the physicians and United Healthcare.

{¶ 39} In short, the *Council of Smaller Enterprises* test, properly applied, calls for arbitration of these claims. The reference test adopted by the court of appeals, asking whether the action could be maintained without reference to the contract, is not consistent with either the federal policy or Ohio's policy of favoring arbitration. The appropriate federal standard is whether allegations underlying the claims "touch matters" covered by the agreements. Because I believe they do in this case, I respectfully dissent.

{¶ 40} I would hold that in determining whether a claim is within the scope of an arbitration agreement, a state court in Ohio may base that determination on a federal standard that inquires whether the allegations underlying the claims touch matters covered by the agreement. I would further stay any

claims of the nonsignatory medical societies pending completion of the arbitration.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Paul M. DeMarco, Terrence L. Goodman, and Jean M. Goeppinger; Strauss & Troy, Richard S. Wayne, Thomas P. Glass, Joseph J. Braun, and Nicole M. Lundrigan; Barrett & Weber, L.P.A., and Michael R. Barrett, for appellees.

Thompson Hine and Stephen J. Butler; Weil, Gotshal & Manges, L.L.P., Gregory S. Coleman, Debra J. Pearlstein, and Elizabeth M. Avery, for appellant.

Tucker Ellis & West, L.L.P., and Irene C. Keyse-Walker, urging reversal for amicus curiae America's Health Insurance Plans.

Issac, Brant, Ledman & Teetor, L.L.P., and Mark Landes, urging reversal for amicus curiae Ohio Manufacturers' Association.

C. Luther Heckman, urging reversal for amicus curiae Ohio Council of Retail Merchants.

Rich, Crites & Wesp, L.L.C., and E. Joel Wesp; Cooper & Kirk, P.L.L.C., David H. Thompson, and Charles J. Cooper; National Chamber Litigation Center, Inc., Robin S. Conrad, and Stephanie A. Martz, urging reversal for amici curiae United States Chamber of Commerce and Ohio Chamber of Commerce.

THE SUPREME COURT OF OHIO

[Filed April 26, 2006

Case No. 04-1
Hamilton County

Academy of Medicine of Cincinnati,
Luis Pagani, M.D., et al.

v.

Aetna Health, Inc., Community Ins. Col, d.b.a.
Blue Cross etc. et al., and Humana Health Plan of Ohio, Inc.

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case is denied.

(Hamilton County Court of Appeals; Nos. C030109, C030110, and C030111)

/s/
THOMAS J. MOYER
Chief Justice

OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1331. MONOPOLIES
RESTRAINTS OF TRADE

§1331.01 Definitions

As used in sections 1331.01 to 1331.14 of the Revised Code:

(A) "Person" includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, and solely for the purpose of the definition of division (B) of this section, a foreign governmental entity.

(B) "Trust" is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

(1) To create or carry out restrictions in trade or commerce;

(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

(5) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any

manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected;

(6) To refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.

"Trust," as defined in this section, does not include bargaining by a labor organization in negotiating or effecting contracts with an employer or employer group with reference to minimum payment to any member of the labor organization for any motor vehicles owned, driven, and used exclusively by such member in the performance of his duties of employment pursuant to a collective bargaining agreement between the labor organization and the employer or employer group.

A trust as defined in division (B) of this section is unlawful and void.

OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1331. MONOPOLIES
RESTRAINTS OF TRADE

§1331.04 Conspiracy against trade prohibited

A violation of sections 1331.01 to 1331.14, inclusive, of the Revised Code, is a conspiracy against trade. No person shall engage in such conspiracy or take part therein, or aid or advise in its commission, or, as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, or rates, or furnish any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violate said sections. Each day's violation of this section is a separate offense.

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No. 05-1465

In the Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

ACADEMY OF MEDICINE OF CINCINNATI, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Ohio Supreme Court properly stated the test common to both Ohio state law and federal law under the Federal Arbitration Act to determine whether a claim falls within an agreement to arbitrate.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves claims by Respondents Academy of Medicine of Cincinnati, Luis Pagani, M.D., Butler County Medical Society, Paul Jennewine, M.D., Bradford H. Woodall, M.D., William Randall Cox, M.D. and Newton H. Bullard, M.D. (collectively "Respondents") that Petitioner United Healthcare of Ohio, Inc. ("Petitioner" or "United Healthcare"), along with Humana, Inc., Anthem Blue Cross and Blue Shield and Aetna Health, Inc., the four largest health insurance companies in Southwestern Ohio (the "Region"), engaged in a conspiracy to maintain artificially low reimbursement rates paid to physicians in the Region in violation of the Valentine Act, Ohio Rev. Code §§1331.01, *et seq.*[1] The antitrust claims alleged by Respondents *predate* and have nothing to do with the current provider contracts which relate to the payment of individual claims and contain the arbitration clauses at issue in this appeal.

It is a fundamental tenet of both Ohio and federal law that a party may not be compelled to submit to arbitration any dispute he has not agreed to so submit. However, that is precisely what Petitioner seeks to have this Court do in

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[1] The original complaint also alleged claims against Defendants Humana, Inc., Aetna Health, Inc. and Anthem Blue Cross and Blue Shield. However, each of these parties have settled these claims. As part of those settlements, each insurance company agreed to increase the total annual reimbursements paid to physicians in the Region and undertake other measures to either monitor future negotiations with physician groups and physician organizations in the Region or fund efforts to enhance physician recruitment and retention in the Region.

seeking a writ of certiorari under the guise that an improper standard of arbitrability has been applied. In support of this argument, Petitioner claims that there is a "growing trend" of state courts concluding that claims are not arbitrable despite broad arbitration clauses; however, the only two decisions referenced by Petitioner are those in this case and its companion case pending in a state court in Kentucky.[2] All of the parties in this appeal agree that arbitration is a matter of contract, and the trial court, appellate court, and Supreme Court of Ohio concluded that Respondents' statutory antitrust claims fall outside of the scope of the arbitration clauses at issue in this litigation. Petitioner has not in its argument in support of its petition for a writ of certiorari made any new or compelling arguments which support review by this Court.

This case was filed by Respondents, on behalf of the more than 2,000 physicians in the Region, in June 2002 in Hamilton County Common Pleas Court in Ohio. The suit alleges that the dominant insurance companies in the Region engaged in anticompetitive behavior, which has had a devastating impact on the availability of quality medical care in the Region. The reimbursement rates paid to doctors in the Region are approximately 30% below the market average paid for the same services in Columbus, Ohio, Indianapolis, Indiana, and Lexington, Kentucky. Petitioner's illegal conduct has resulted in fewer hospitals, fewer physicians, a deficit of health care, a lack of necessary trauma centers, fewer innovative procedures available to patients in the Region, and

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[2] *United Healthcare of Ohio, Inc. v. Northern Kentucky Medical Society*, Case No. 05-1466, pending in this Court on a petition for a writ of certiorari to the Kentucky Court of Appeals. The Kentucky Supreme Court declined to review the Kentucky Court of Appeals' decision that the state law antitrust claim did not fall within the arbitration provision at issue in this case.

a decrease in physician pay by an average of nearly 30%. In fact, in the areas of reimbursement rates for new patients, established patients, inpatient and outpatient consultations, hospital admissions, subsequent hospital care visits and hospital discharges, Cincinnati not only ranked last, but *below* the market average.

Petitioner's actions have also caused a decrease in the number of hospitals in the Region, despite an increasing population in the Region. At the same time, Petitioner's profits have grown substantially. As Petitioner continued to engage in anticompetitive behavior, its profits grew while the number of doctors and quality of care declined in the Region. For example, in the first half of 2001, United Healthcare's earnings were up 25% to $435 million on revenues of $11.5 billion.

Despite the fact that Respondents' claims arise independently of the provider agreements entered into between some Respondent physicians in the Region and Petitioner, shortly after Respondents filed their Complaint, each Defendant filed separate motions to compel the antitrust claims to arbitration. Petitioner's arguments have been rejected at each level below. Accordingly, this Court should deny Petitioner's request for a writ as it does not merit review.

REASONS FOR DENYING THE PETITION

This matter does not involve novel or unresolved issues regarding the test courts should apply under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to determine if a claim is subject to arbitration. Nor does this matter involve a split among any courts regarding the appropriate test to apply under the FAA. Rather, this matter merely

involves traditional principles of contract interpretation. Petitioner does not like the decisions rendered by the three Ohio courts and separately by the two Kentucky courts which determined that the claims did not fall within the arbitration provisions. However, an alleged misapplication of the test, properly set forth by the Ohio Supreme Court to the facts and contract provision at issue in this case, is not a compelling reason to grant certiorari. *See* Sup. Ct. R. 10.

I. The Ohio Supreme Court Properly Stated the Rules of Law Applicable Under Federal and Ohio State Law to Determine if a Claim is Within an Agreement to Arbitrate.

A. There is No Conflict Between the Ohio Supreme Court and the United States Courts of Appeals Regarding the Appropriate Principles of Law Applicable Under Federal Law to Determine If a Claim is Arbitrable.

The Question Presented by Petitioner does not accurately reflect the Ohio Supreme Court's statement or application of the test, common to both Ohio state courts and federal courts, for determining whether a claim falls within an agreement to arbitrate. Contrary to Petitioner's suggestion, the Ohio Supreme Court accurately stated the rule of law applicable under both Ohio law and the FAA for determining whether a claim is arbitrable.

Petitioner distorts the holdings below by asserting that the test adopted by the Ohio Supreme Court for determining if a claim is within the scope of the parties' arbitration agreement "considers only whether the elements of [the statutory and tort] claims reference the parties' contract." (Petition for Writ of Certiorari, at p. i.) Rather, the Ohio Supreme Court

specifically recognized that there are four principles that guide determinations of arbitrability, which were derived from the federal standard articulated by this Court in *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986), and which are common to both Ohio state and federal courts. *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 842 N.E.2d 488, 490-92 (2006). The Ohio Supreme Court accurately stated the rules of law applicable to such determinations as follows:

> (1) that arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit;
> (2) that the question whether a particular claim is arbitrable is one of law for the court to decide;
> (3) that when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying claim; and
> (4) that when a contract contains an arbitration provision, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Id.* (internal quotations and citations omitted).

The test set forth by the Ohio Supreme Court is the same test adopted by this Court for determining the arbitrability of claims, and it remains the rule today. *AT & T Technologies, Inc.*, 475 U.S. at 648-49. There is no dispute between or among the Ohio Supreme Court and the federal Courts of Appeals regarding the applicability of these principles to questions of arbitrability under federal law. *See, e.g., Air*

Line Pilots Ass'n v. Federal Express Corp., 402 F.3d 1245, 1248 (D.C. Cir. 2005); *Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital*, 415 F.3d 145, 149 (1st Cir. 2005); *Alliance Bernstein Inv. Research and Management, Inc. v. Schaffran*, 445 F.3d 121, 125 (2d Cir. 2006); *Medtronic AVE Inc. v. Cordis Corp.*, 100 Fed.Appx. 865, 866-67 (3d Cir. 2004); *East Coast Hockey League, Inc. v. Professional Hockey Players Ass'n*, 322 F.3d 311, 314 (4th Cir. 2003); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 752 (5th Cir. 1995); *Cleveland Elec. Illuminating Co. v. Utility Workers Union of America*, 440 F.3d 809, 813 (6th Cir. 2006); *Local Union 1393 Intern. Broth. of Elec. Workers, AFL-CIO v. Utilities Dist. of Western Indiana Rural Elec. Membership Co-op.*, 167 F.3d 1181, 1183-84 (7th Cir. 1999); *Kansas City Southern Transport Co., Inc. v. Teamsters Local Union #41*, 126 F.3d 1059, 1067 (8th Cir. 1997); *Carpenters 46 Northern California Counties Conference Bd. v. Zcon Builders*, 96 F.3d 410, 414 (9th Cir. 1996); *Oil, Chemical and Atomic Workers Intern. Union Local 5-391 v. Conoco, Inc.*, 64 Fed.Appx. 178, 181 (10th Cir. 2003); *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 712 (11th Cir. 1987).

Since the Ohio Supreme Court properly stated the applicable rules of law under federal law, this Court should deny Petitioner's request for a writ of certiorari.

B. The Method of Analysis Approved by the Ohio Supreme Court for Application of the First Prong of the Four-Part Test is Consistent With Federal Law

The sole issue reviewed by the Ohio Supreme Court concerned application of the first prong of the four part test, specifically, that "arbitration is a matter of contract and a

party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *Academy of Medicine of Cincinnati*, 842 N.E.2d at 491. The court stated: "The only issue before us is whether the court of appeals employed a proper test for determining the scope of the arbitration clause at issue, i.e., whether the parties agreed to submit this dispute to arbitration." *Id.* at 492.

Recognizing that "[a]rbitration is not limited to claims alleging a breach of contract, and creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision," *Id.* at 493, the Ohio Supreme Court found that the method of analysis employed by the Sixth Circuit Court of Appeals in *Fazio v. Lehman Brothers,* 340 F.3d 386 (6th Cir. 2003), was a helpful guide in the application of this prong of the test:

> The *Fazio* test applied by the court below helps determine whether the contractual relationship between parties is irrelevant or controlling. Since courts must sift through pleadings to determine whether a cause of action labeled as a tort or statutory claim is essentially a cause of action based upon the contract, we agree with *Fazio* that "a proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue." *Academy of Medicine of Cincinnati*, 842 N.E.2d at 494.

It, therefore, approved application of this method of analysis by Ohio courts when making a determination concerning the scope of an arbitration agreement. *Id.*

Petitioner's attack of the Ohio Supreme Court's decision is largely based upon a misreading of the decision. First, in

an effort to characterize the Ohio Supreme Court's opinion as constrictive and hostile to arbitration, Petitioner misstates the test approved by the Ohio Supreme Court by asserting that the Ohio Supreme Court "insist[s] that elements of claims reference parties' underlying contracts as a prerequisite to compelling arbitration under the FAA." (Petition for Writ of Certiorari, at pp. 9-10.) In reality, the Ohio Supreme Court merely stated that when determining whether a cause of action is within the scope of an arbitration agreement, "a state court in Ohio *may* base that determination on a federal standard that inquires whether the action could be maintained without reference to the contract or relationship at issue." *Academy of Medicine of Cincinnati*, 842 N.E.2d at 494 (emphasis added). The court, therefore, approved the use of this method of analysis by Ohio courts, but did not require courts to do so, preclude other methods of analysis, or insist that the elements of the claim reference the contract to be within the scope of the arbitration agreement.

Nor did the Ohio Supreme Court create a distinct test applicable to statutory or tort claims, or render non-arbitrable all tort and statutory causes of action, as Petitioner suggests. In fact, the opposite is true. The Ohio Supreme Court specifically recognized that the facts of *Fazio* demonstrate that its rule "is consistent with a policy favoring arbitration," and that statutory and tort claims may appropriately be compelled to arbitration, depending on the facts and contractual language at issue. *See id.* The Ohio Supreme Court examined the facts of *Fazio* in reaching its conclusion. In *Fazio*, clients of a broker accused of misappropriating his client's money brought suit against the brokerages houses for which he worked, including statutory and tort claims for securities laws violations, theft, churning, unauthorized trading, and excessive risk taking. *Id.* (citing *Fazio*, 340 F.3d at 395). The Sixth Circuit found that the fraudulent activities were a

violation of the account agreement, and therefore covered by the arbitration clauses at issue. *Id.*

Thus, by looking to *Fazio* for guidance, the Ohio Supreme Court recognized that statutory and tort claims are arbitrable under the test enunciated in *Fazio* in appropriate circumstances. It also stated that "[a]rbitration is not limited to claims alleging a breach of contract." *Id.* at 493. However, the court recognized that "the existence of a contract between the parties does not mean that every dispute between the parties is arbitrable," and the *Fazio* test functions as a tool to assist in making that determination.

> The *Fazio* test does not act as a detriment to arbitration. It functions as a tool to determine a key question of arbitrability-whether the parties agreed to arbitrate the question at issue. It prevents the absurdity of an arbitration clause barring a party to the agreement from litigating *any* matter against the other party, regardless of how unrelated to the subject of the agreement. It allows courts to make determinations of arbitrability based upon the factual allegations in the complaint instead of on the legal theories presented. *Id.* at 494.

In approving the test, the Ohio Supreme Court, therefore, recognized that the focus of any inquiry is the substantive factual allegations of the complaint, rather than the labels attached to the causes of action.

The "contract reference" test approved by the Ohio Supreme Court is one method that can be used to analyze the substantive factual allegations. The argument advanced by Petitioner erroneously assumes that only one method of analysis, *i.e.*, the "touch matters" or "contract reference"

method, may properly be applied to the complaint's factual allegations by a court when determining the scope of an agreement to arbitrate. However, asking whether the allegations underlying the claims "touch matters" covered by the arbitration agreement is no different than asking whether a claim can be "maintained without reference to the contract or relationship." Both questions seek to determine the scope of the arbitration clause by analyzing whether the asserted claims and facts underlying those claims arise independently of the agreement to arbitrate. Both focus upon the factual allegations, rather than the labels given to the causes of action. As demonstrated by the Sixth Circuit in *Fazio*, a case relied on by the Ohio Supreme Court, the tests are not mutually exclusive, but, rather, complement each other.

> District courts have the authority to decide, as a threshold matter, whether an issue is within the scope of an arbitration agreement. *Stout*, 228 F.3d at 714. **A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.** *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250-51 (5th Cir.1998) (applying Texas arbitration law under a choice of law provision). Torts may often fall into this category, but merely casting a complaint in tort does not mean that the arbitration provision does not apply. *Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1030 (7th Cir.2002). **Even real torts can be covered by arbitration clauses "[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]."** *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir.1987). We are, however, aware of the Supreme Court's warning

> against "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options,* 514 U.S. at 945, 115 S.Ct. 1920. *Fazio*, 340 F.3d at 395 (emphasis added); *see also Deputy v. Lehman Brothers Inc.*, 2004 WL 3770574, 4 (E.D.Wis. 2004) (adopting test set forth in *Fazio*); *see also Service Corp. Intern. v. Lopez* , 162 S.W.3d 801, 810 (Tex. App. 2005) (demonstrating further the complementary nature of the "touch matters" and "contract reference" approaches).

Neither this Court, nor any other Court of Appeals, has indicated that these methods of analysis are mutually exclusive, that the "touch matters" test is the exclusive method of analysis, or that the "contract reference" method is inappropriate. Contrary to Petitioner's suggestion, this Court did not establish the "touch matters" test as the exclusive method for analyzing the scope of an arbitration clause in *Mitsubishi,* 473 U.S. at 625 fn.13. Rather, this Court used the phrase "touch matters" in a footnote while examining the claim at issue in *Mitsubishi*:

> Soler does suggest that, because the title of the clause referred only to "certain matters," App. 52, and the clause itself specifically referred only to "Articles I-B through V," *ibid.*, it should be read narrowly to exclude the statutory claims. Soler ignores the inclusion within those "certain matters" of "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to [the specified provisions] or for the breach thereof." Contrary to Soler's suggestion, the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach

> of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability. *Id.*

If this Court's footnote were given the broad reach urged by Petitioner, the traditional principles of contract interpretation that this Court has instructed courts to apply, *First Options of Chicago, Inc v. Kaplan,* 514 U.S. 938, 944 (1995), *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-63 (1995), would be effectively eviscerated. *See Alticor, Inc. v. National Union Fire Ins. Co.*, 411 F.3d 669, 673 (6th Cir. 2005) (rejecting appellant's reliance upon the United States Supreme Court's footnote in *Mitsubishi* to argue that dispute should be compelled to arbitration because it "touches matters" covered by arbitration agreement, stating that appellant "reads this passing comment out of context, and we do not believe the words have the broad impact [appellant] would give them"). Indeed, Petitioner cites no authority which states that only the "touch matters" method of analysis is correct or that the "contract reference" method is incorrect.

Most important, the Ohio Supreme Court's approach is consistent with the principles set forth under federal law and advances the federal policy favoring arbitration where appropriate. Consistent with directives from this Court and federal Courts of Appeals, the Ohio Supreme Court properly held that determinations of arbitrability must be based upon the factual allegations in the complaint, rather than the legal theories presented. *Academy of Medicine of Cincinnati,* 842 N.E.2d at 494. There is no dispute among the Ohio Supreme Court and the federal Courts of Appeals on this point.

Petitioner mischaracterizes the Ohio Supreme Court's holding by suggesting that the test is based upon artful pleading rather than the underlying factual allegations. (Petition for Writ of Certiorari, at p. 14.) The test approved by the Ohio Supreme Court is not whether the *complaint* references the arbitration agreement, as Petitioner states. (*Id.*) Rather, it is whether "the action could be maintained without reference to the contract or relationship at issue." *Academy of Medicine of Cincinnati*, 842 N.E.2d at 494 (emphasis added). Consistent with federal law, as the Ohio Supreme Court recognized, the test appropriately looks to the substance of the factual allegations rather than the legal theories presented. *Id.* at 493, 494 ("Arbitration is not limited to claims alleging a breach of contract, and creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision.")

II. The Ohio Supreme Court Correctly Applied the Test of Arbitrability to the Agreements, Facts, and Claims Involved in this Case

A. Arbitrability is a Matter of Contract, and the Ohio Courts Applied Traditional Contract Principles in Making Their Determination

Petitioner's emphasis upon the federal policy favoring arbitration loses sight of the fact that arbitrability is a matter of contract interpretation, and a fundamental tenet of federal law is that a party cannot be compelled to submit to arbitration any dispute which he has not agreed to so submit. *AT&T Technologies, Inc.*, 475 U.S. at 648-49. As this Court, and the Ohio Supreme Court, have recognized, "'[t]he overarching issue is whether the parties agreed to arbitrate the issue.'" *Academy of Medicine of Cincinnati*, 842 N.E.2d at 493 (quoting *Mitsubishi*, 473 U.S. at 626). Although federal

law favors arbitration, the intent of the contracting parties is paramount and can trump the FAA's policy in favor of arbitration.

> The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." . . . Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. *Id.*, at 626, 105 S.Ct. 3346. While ambiguities in the language of the agreement should be resolved in favor of arbitration, . . . we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated. "Arbitration under the [FAA] is a matter of consent, not coercion." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002) (some internal citations omitted); *see also Mastrobuono*, 514 U.S. at 57.

Further, simply because parties have a contract relating to certain matters does not mean that every dispute that arises between them will be subject to arbitration. The FAA places arbitration agreements on equal footing with other contracts, but not greater footing.

> Nothing in the Federal Arbitration Act overrides normal rules of contractual interpretation; the Act's goal was to put arbitration on a par with other

> contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), and nothing beats normal rules of contract law to determine what the parties' agreement entails. There is no denying that many decisions proclaim that federal policy favors arbitration, but this differs from saying that courts read contracts to foist arbitration on parties who have not genuinely agreed to that device. *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003) (holding that arbitration agreement between trusts and clearing broker did not require arbitration of trustee's fraud claim against broker).

When deciding whether the parties agreed to arbitrate a dispute, courts are to apply traditional state-law principles that govern the formation and interpretation of contracts. *First Options of Chicago, Inc*, 514 U.S. at 944; *Mastrobuono*, 514 U.S. at 60-61. Because arbitration is a matter of contract, it goes without saying that parties to a lawsuit who were not parties to the arbitration agreement cannot be compelled to arbitrate their claims. This is true under both Ohio and federal law. *Waffle House, Inc.*, 534 U.S. at 294 (stating that "[i]t goes without saying that a contract cannot bind a nonparty," and holding that claim brought by EEOC, a non-party to the contract containing the arbitration provision, on behalf of employees who were parties to the contract, was not subject to arbitration); *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 247 (5th Cir. 1998) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)) ("Unless required by statute, a person

who is not a party to a pre-dispute contract to arbitrate cannot be compelled to submit a dispute to arbitration."); *Benjamin v. Pipoly*, 800 N.E.2d 50, 58 (Ohio 10th Dist. 2003) (citing *Council of Smaller Ents. v. Gates, McDonald & Co.*, 687 N.E.2d 1352 (1998)).

In Ohio, a presumption *against* arbitration arises with respect to claims by parties who were not signatories to the written arbitration agreement. *Benjamin*, 800 N.E.2d at 58. Because parties may be compelled to arbitrate only those claims to which they have agreed, the threshold question whether any agreement to arbitrate has been made must be considered before turning to the question of arbitrability of any particular claim. *Id.* Here, Respondents include the Academy of Medicine of Cincinnati and the Butler County Medical Society. Neither party signed any agreement to arbitrate or otherwise made any agreement to arbitrate any claim. In *Benjamin*, the court held that because the appellant was not a signatory to the agreement containing the arbitration clause, she could not be compelled to arbitrate her claims. This was true even though the appellant represented the rights of others who were parties to the arbitration agreements. *Id.* at 58-59. The same is true here. The medical societies were not signatories to the agreements containing the arbitration clauses, and their claims are not subject to the FAA and cannot be compelled to arbitration or stayed.

Similarly, the Ohio courts correctly determined that the physicians' claims should not be compelled to arbitration because the state law anti-trust claim alleged is not within the scope of the arbitration agreement. "[I]t is the language of the contract that defines the scope of disputes subject to arbitration." *Waffle House, Inc.*, 534 U.S. at 289. The Ohio courts who reviewed the arbitration agreement at issue examined the factual allegations and the language of the

agreements and applied traditional contract principles. Every one of the courts determined that the state anti-trust claim alleged by Respondents was not within the scope of the arbitration agreement.

The provider agreements which contained the arbitration provision were entered into between individual physicians and Petitioner United Healthcare (and the three other insurance companies who were named as defendants and who have since settled their claims). The agreements established a fee schedule for reimbursement by Petitioner of the physicians for certain medical procedures. The arbitration provision requires the parties to the agreement to arbitrate disputes relating to their "business relationship." The dispute at issue here, however, centers on whether Petitioner illegally conspired or colluded with other insurance companies to set reimbursement rates in the region lower than the prevailing rates in comparable health care markets.

The Ohio Supreme Court recognized that both Ohio and federal law favors arbitration to settle disputes. *Academy of Medicine*, 842 N.E.2d at 491. However, it also recognized that arbitrability is a matter of contract, and affirmed the appellate court's determination that the dispute was not within the scope of the agreement to arbitrate. *Id.* at 494. As the Ohio appellate court found:

> The allegations that the HMOs, which controlled a majority of the health-care market in this region, colluded to fix reimbursement rates to medical practitioners arose out of actions that occurred prior to the existence of the underlying provider agreements or business relationships between the doctors and HMOs. The allegations did not even presume the existence of an underlying provider agreement. *Academy of*

Medicine of Cincinnati v. Aetna Health, Inc., 800 N.E.2d 1185, 1187 (Ohio 1st Dist. 2003).

Simply because the physicians and insurance companies agreed to a fee schedule and agreed to arbitrate disputes concerning their "business relationship" does not mean that the physicians agreed to arbitrate disputes alleging an illegal conspiracy among insurance companies with regard to artificial capping of reimbursement rates, to which Respondents have been victims. This is not a dispute about the business relationship between the physicians and Petitioner. The dispute concerns the illegal agreement among insurance companies in the Region. The allegations of an agreement among insurance companies to fix prices arose out of the conduct of the insurance companies before the provider agreements containing the arbitration provision were even executed. The anti-competitive behavior alleged by Respondents predates and has nothing to do with the current provider contracts which relate to the payment of individual claims and contain the arbitration clauses at issue in this appeal. The anti-trust claims arise independently of the provider agreements.

There's a reason every court in Ohio and Kentucky in this case who has considered this issue has determined that the dispute is not within the scope of arbitration clause, and it is not because the courts are hostile to arbitration as Petitioner asserts. In fact, the Ohio Supreme Court expressly stated that both Ohio and federal courts encourage arbitration. *Academy of Medicine of Cincinnati*, 842 N.E.2d at 491. Rather, it is because, after examining the specific factual allegations of the complaint and the language of the arbitration clause at issue, the courts have applied standard contract principles and determined that this dispute is not within the scope of the

arbitration clauses. The result is the same whether a court applies the "contract reference" or "touch matters" test.

Petitioner is wrong to rely primarily on the favored status of arbitration as the basis to obtain this Court's review of the Ohio Supreme Court's decision. The Ohio Supreme Court and lower Ohio courts correctly interpreted the contract provision at issue in light of the factual allegations. The medical societies who were not parties to the arbitration agreement cannot be compelled to arbitrate their claims. Further, applying traditional principles of contract interpretation, this dispute is simply not within the scope of the arbitration agreement.

B. The Determination of Whether An Anti-Trust Claim is Arbitrable Depends Upon the Specific Facts and Contract Language At Issue, and Neither the United States Supreme Court, Nor the Ohio Supreme Court, Has Made Anti-Trust Claims Per Se Arbitrable

The determination of whether a claim is within the scope of an arbitration agreement is driven by an analysis of the factual allegations made in the complaint and the court's application of state law principles of contract interpretation. Because the determination is dependent upon the specific facts alleged and the specific contract language at issue, it is impossible to create per se rules with respect to arbitrability. The facts and contract language will differ in every case, creating the likelihood of differing results.

In *Mitsubishi,* this Court considered the arbitrability of a federal anti-trust claim in the context of an international transaction. *Mitsubishi*, 473 U.S. 614. The petitioner relied upon both the FAA and the Convention on the Recognition

and Enforcement of Foreign Arbitral Awards is seeking to compel arbitration of the dispute. *Id.* at 614. In its decision this Court did not undertake its own analysis of the scope of the arbitration language at issue. Plaintiff had not appealed the lower court's determination that the antitrust claim implicated the arbitration agreement. Rather, the Court considered whether the federal anti-trust claim was nonarbitrable due to legal constraints or policy considerations even though the parties had agreed to arbitrate such claims. *Id.* at 628-29.

This Court first held that there was no reason to carve statutory claims out as inappropriate for arbitration. *Id.* at 626. They are subject to the same rules of contract interpretation and arbitrability as any other claim, unless the legislative intent or public policy considerations demonstrate some legal constraint foreclosing the arbitration of a particular statutory claim. The Court then determined that the federal anti-trust claim at issue in *Mitsubishi* was arbitrable, basing its decision almost entirely upon the international nature of the transaction at issue, and recognizing that a different result may occur in a domestic context.

> We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (1968). Notwithstanding the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act, the Second Circuit there reasoned that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make ··· antitrust claims ···

> inappropriate for arbitration." *Id.*, at 827-828. We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions. As in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), *we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.* *Id.* at 628-29 (emphasis added).

This Court, therefore, did not hold that all anti-trust claims are arbitrable. Rather, it merely held that statutory claims *could* be subject to arbitration if the parties agreed to submit statutory claims to arbitration, and that the international nature of the dispute before it made arbitration particularly appropriate. In other words, the Court held that there was no legal constraint or policy consideration applicable to the federal anti-trust claim that would render it non-arbitrable despite the parties' agreement to arbitrate the claim. The factual allegations and particular contract language at issue in each dispute still must be analyzed to determine if the parties agreed to arbitrate the specific statutory or tort claim alleged.

The Ohio Supreme Court applied *Mitsubishi* in determining that the parties had not agreed to arbitrate the state law anti-trust claim at issue here. The court first determined that the arbitration clause did not remove statutory claims from the scope of the agreement, and the Valentine Act did not preclude a waiver of judicial remedies for the

rights it creates. *Academy of Medicine of Cincinnati*, 842 N.E.2d at 492. Consistent with *Mitsubishi,* the Ohio Supreme Court recognized that statutory claims, including anti-trust claims, are neither *per se* arbitrable nor non-arbitrable:

> *Mitsubishi* does not make every antitrust claim arbitrable between parties to an arbitration agreement. Statutory claims, including antitrust claims, are neither per se arbitrable or not arbitrable. *Those claims must undergo the analysis that every other claim faces: whether the parties agreed to arbitrate the issue.* In *Mitsubishi,* the lower court had found (and the plaintiff did not dispute on appeal) that each element in the mix of allegations that yielded the plaintiff's antitrust claim individually implicated a provision of the sales procedure agreement between the plaintiff and Mitsubishi. *Id.* at 493 (emphasis added).

The Ohio Supreme Court affirmed the appellate court's holding that Respondents' anti-trust claim did not fall within the scope of the agreement to arbitrate between the parties. Respondents do not assert, and the Ohio Supreme Court did not hold, that all anti-trust claims are non-arbitrable. Rather, every court that has considered the arbitration agreement at issue has concluded that the anti-trust claim alleged in this case is not subject to the arbitration agreement based upon their interpretation and analysis of the specific contract language and factual allegations of the complaint.

Differing results among courts that have considered the arbitrability of anti-trust claims are inevitable because of the highly factual nature of such an inquiry. Petitioner asserts that "the federal courts of appeals have uniformly held that anti-trust claims are arbitrable." (Petition for Writ of

Certiorari, at p. 15.) While it may be true that courts have recognized that there is generally no legal constraint or policy consideration that would render anti-trust claims non-arbitrable even where the parties agreed to arbitrate such claims, an analysis of the particular factual allegations and contract language in each case is still required to determine whether the parties agreed to arbitrate the particular claim and the scope of the arbitration agreement. The result of the courts' analyses of the varying factual situations and varying contract language has produced different results.

For example, in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995), the court concluded that although the arbitration clause at issue encompassed antitrust claims generally, some of the antitrust causes of action Coors Brewing Company brought against Molson Breweries of Canada Limited were outside the scope of the contract between the two companies. *Id.* at 1516-17. The court held that Coors was entitled to litigate the antitrust claims not related to the licensing agreement containing the arbitration provision "just as anyone else with standing may." *Id.* at 1517. The court recognized that *Mitsubishi* provided no support for categorically concluding that all antitrust claims must go to arbitration. *See Id.* at 1516.

> Although *Mitsubishi* allowed parties to a contract to compel the arbitration of their antitrust disputes, it did not proclaim that all disputes between parties who include an arbitration clause in their contracts are subject to arbitration. A dispute within the scope of the contract is still a condition precedent to the involuntary arbitration of antitrust claims. . . A contrary reading of *Mitsubishi* not only ignores the facts of that case, but also could lead to absurd results. For example, if two small business owners execute a

> sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship. Similarly, in this case, Coors is entitled to litigate its antitrust claims regarding the Miller-Molson relationship in a public forum so long as the claims are not related to the licensing agreement. *Id.* at 1516 (internal citation omitted).

Other federal and state courts have similarly found that antitrust claims were not within the scope of the arbitration agreement at issue. *See, e.g., AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999); *Armco Steel Co., L.P. v. CSX Corp.*, 790 F.Supp. 311, 317 (D.D.C. 1991); *Swensen's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1350 (8th Cir. 1991). Likewise, courts have determined that specific statutory and tort claims were outside the scope of the arbitration agreements being litigated. *See, e.g., Aiken v. World Fin. Corp. of S.C.*, 623 S.E.2d 873, 876 (S.C. App. 2005) (holding that tort claims for intentional infliction of emotional distress, negligence, and unfair trade practices were not within scope of arbitration agreement relating to loan agreement because the tort claims were independent of the loan agreement); *Loy v. Harter*, 128 S.W.3d 397, 405 (Tex.App. 2004) (holding that tort claim for breach of fiduciary duty was not covered by arbitration provision in employment agreement where claim was independent of employment relationship and could be maintained without reference to the employment agreement); *Cohen v. PaineWebber, Inc.*, 2002 Ohio App. LEXIS 161 (Ohio App. 1st Dist. 2002) (holding that arbitration provision in

investment account agreement did not cover torts alleging theft), appeal not allowed 95 Ohio St.3d 1460, *cert. denied* 537 U.S. 974; *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998) (holding that Lanham Act false advertising claim was not within the scope of the arbitration agreement).

Petitioner relies upon the Second Circuit Court of Appeals' decision in *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 167 (2d Cir. 2004), for its assertion that a conflict exists between that court and the Ohio Supreme Court. However, the similarities between the cases end with the fact that both involve anti-trust claims. The language of the anti-trust provision in *JLM*, which provided that "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter" are subject to arbitration, is substantially different than the arbitration agreement at issue here which requires parties to arbitrate disputes relating to their "business relationship." *See id.* at 172. Further, *JLM* arose in an international, rather than domestic context. Interestingly, the *JLM* court noted that it had previously cautioned against use of the "touch matters" test propounded by Petitioner, finding that "'touch matters' and like phrases do not 'yield[ ] a principled way of ··· deciding whether ··· claims should be sent to arbitration.'" *Id.* at 172-73 (internal citation omitted).

JLM establishes nothing more than what Respondents have already stated – whether a particular statutory or anti-trust claim is arbitrable depends upon the specific factual allegations and contract language at issue in each case. Here, the Ohio and Kentucky courts who have considered Respondents' factual allegations and the language of the arbitration agreement have uniformly held that Respondents' anti-trust claim does not fall within the scope of the arbitration provision.

III. Neither The Ohio Supreme Court's Alleged Misapplication of the Rule of Law, Nor Petitioner's Dissatisfaction with the Result of the Ohio Courts' Application of the Test, Are Compelling Reasons to Grant Certiorari

Petitioner's argument is, in essence, a complaint that the Ohio Supreme Court reached the wrong result in its application of the rules of arbitrability to the factual allegations and contract language at issue in this case. Petitioner does not like the result that every court in Ohio and Kentucky who has considered these factual allegations and contract language has reached. However, as demonstrated above, the Ohio Supreme Court properly stated the applicable rules of law, and its alleged misapplication of these rules of law is not a compelling reason to grant certiorari.

The determination of whether a claim is within the scope of an agreement to arbitrate is a factual analysis. The result is driven by the factual allegations of the complaint and the intent of the parties to the contract containing the arbitration provision. As explained above, there will necessarily be differing results upon application of these rules of law due to the differing factual scenarios presented by each case. Petitioner asks this Court to disregard the findings made by the Ohio courts, and conduct a *de novo* review of the courts' application of the arbitrability rules to the factual allegations and contract language at issue. Such is not the role of this Court. Because Petitioner presents no question of great federal importance, its petition for a writ of certiorari should be denied.

IV. The Court Has Already Determined That The Question Presented by Petitioner Does Not Merit Review

Petitioner seeks to have this Court review the findings of the trial court, the appellate court and the Supreme Court of Ohio. Each of these courts applied federal case law when reviewing the arbitrability of claims and arrived at a decision which is opposed by Petitioner. This precise issue was considered and determined to not merit review by this Court in *UBS PaineWebber, Inc. v. Cohen*, 537 U.S. 974 (2002), when it denied certiorari to the Sixth Circuit case which also correctly applied federal law to certain claims and found by them to fall outside the scope of those contemplated by an arbitration provision among the parties.

In *Cohen v. PaineWebber, Inc.*, 2002 Ohio App. LEXIS 161 (Ohio App. 1st Dist. 2002), a customer of investment firm PaineWebber agreed to arbitrate "any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement." *Id.* at 3. The customer's estate alleged that the defendants, including PaineWebber, had stolen money from this account. *Id.* at 3-4. The trial court denied PaineWebber's motion to compel arbitration, and the Court of Appeals affirmed, on the ground that, at the time the plaintiff entered into the agreement, the parties never contemplated that the arbitration clause would cover theft. *Id.* at 4-6. The court explained:

> A contract requires a "meeting of the minds" as to the terms contained within. At the time that the parties entered into the contract, there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft. If the parties

> had contemplated, at the time that they entered into the arbitration agreement, that PaineWebber would possibly steal from Ginsburg, that would surely be against public policy. Matters more likely to have been contemplated by both parties would have involved questions of whether a particular transaction was authorized or whether there was any miscalculation in the sum of money contained in the account. Here, the claims filed by Cohen alleged that [defendants] had engaged in conduct beyond the scope of the brokerage agreement .... Accordingly, under the stated circumstances in this case, we hold that, as a matter of law, the claims of unlawful conversion and fraudulent concealment, were not subject to the arbitration provision. *Id.* at 9.

The Ohio First District Court of Appeals' reasoning in *Cohen*, which was affirmed by the Ohio Supreme Court, and also denied certiorari review by this Court, is directly applicable here. Respondents agreed to arbitrate disputes arising out of or relating to its contracts with Petitioner – *i.e.*, breach of contract claims. The parties never contemplated the prospect that Petitioner would unlawfully conspire with other health insurance companies to fix reimbursement rates, anymore than the customer of PaineWebber contemplated the prospect of theft of funds from his account. If unlawful conduct – whether a conspiracy to fix rates or theft – had been contemplated as part of the parties' "meeting of the minds," that would have been contrary to long established public policy (which condemns illegal price-fixing no less than it condemns theft). Thus, Petitioner here, like PaineWebber in *Cohen*, engaged in conduct beyond the scope of the various contracts between the parties, and, as a matter of law, the Ohio courts found the claims of unlawful price-fixing not subject to the arbitration provision.

The decisions of the Hamilton County Common Pleas Court, the Ohio Court of Appeals and the Ohio Supreme Court all correctly applied federal standards of arbitrability in reaching the conclusion that the antitrust claims of Respondents fall outside the scope of the arbitration provisions at issue in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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IN THE

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UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

ACADEMY OF MEDICINE OF CINCINNATI, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Court should grant the petition to resolve the conflict between the touch-matters arbitrability test used in most jurisdictions and the restrictive contract-reference test authorized by the Ohio Supreme Court. By conceding that two tests exist and by failing to deny the inevitability of forum shopping and gamesmanship resulting from Ohio's contract-reference test, respondents confirm the need for the Court's review of the proper arbitrability standard for statutory and tort claims.

Although respondents attempt to marginalize the significance of the contract-reference test by recharacterizing it as a mere tool for factual analysis of allegations in a complaint, they cannot deny that the contract-reference test conclusively determines whether a claim will be arbitrable. Nor can they demonstrate how, as they contend, the two tests can coexist in

a complementary manner when the contract-reference test has a critically different focus than the touch-matters analysis performed by most courts. Specifically, the touch-matters standard focuses on the language of parties' arbitration agreements and faithfully carries out congressional intent to ensure their enforceability, whereas the contract-reference test focuses on the litigation claims themselves and never seriously looks at the terms to which the parties agreed.

These fundamentally disparate approaches yield strikingly different results when, as in this case, the parties' arbitration agreement is broad, encompassing "any disputes about their business relationship." If a court begins, under the touch-matters test, with that language, the relevant arbitrability inquiry is whether a dispute touches, in any way, the parties' business relationship. Price-fixing allegations based on contractually established rates unquestionably do. But if, as in Ohio, a court begins its inquiry by asking whether the claims reference the contract, the scope of the parties' arbitration agreement becomes immaterial. Neither the FAA nor this Court's arbitrability directives permit that result. By ignoring the language of the parties' agreement and inquiring, instead, whether the asserted claims reference the underlying contract, the contract-reference test frustrates congressional intent by permitting courts to unjustifiably restrict the enforceability of arbitration agreements and by enabling parties to use artful pleading to escape their arbitration obligations. The Court should grant the petition to resolve the conflict over the proper arbitrability standard for statutory and tort claims created by the contract-reference test—which has been applied not only by Ohio, but by Kentucky (presented in companion petition No. 05-1466) and by Texas and South Carolina as well.

ARGUMENT

I. RESPONDENTS CONCEDE THAT COURTS DO NOT EMPLOY A UNIFORM SCOPE-OF-ARBITRABILITY TEST.

Respondents' acknowledgement that courts rely on more than one test for scope-of-arbitrability analysis of statutory and tort claims confirms the need for the Court's review. Br. Opp'n 10-11. Recognizing the existence of two distinct tests—*Mitsubishi*'s touch-matters test and the contract-reference test adopted by the Ohio Supreme Court—respondents argue for their coexistence and independent usefulness. Br. Opp'n 10-11.[1] But the unavoidable variation in arbitration and FAA enforcement that results from

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[1] Respondents acknowledge courts' use of the touch-matters test but wrongly suggest that it is not widely adopted. The federal courts of appeals have consistently applied that standard, however, and their reliance on the touch-matters test stands in sharp contrast to Ohio and Kentucky's adoption of the contract-reference test, which also is used in Texas and South Carolina. See, *e.g.*, *Fazio* v. *Lehman Bros.*, 340 F.3d 386, 395 (CA6 2003) (citing touch-matters test in compelling arbitration of broker dispute); *Brayman Constr. Corp.* v. *Home Ins. Co.*, 319 F.3d 622, 626 (CA3 2003) (applying touch-matters test in compelling arbitration of workers-compensation dispute); *CK Witco Corp.* v. *Paper Allied Indus.*, 272 F.3d 419, 422-424 (CA7 2001) (citing touch-matters test and holding that labor disputes under collective-bargaining agreement were subject to arbitration); *Brown* v. *Coleman Co., Inc.*, 220 F.3d 1180, 1184 (CA10 2000) (applying touch-matters test and affirming district court's finding that the arbitration panel correctly asserted jurisdiction over the defamation claim); *Simula, Inc.* v. *Autoliv, Inc.*, 175 F.3d 716, 721-723 (CA9 1999) (applying touch-matters test and holding that antitrust claims were fully arbitrable); *Pennzoil Exploration & Prod. Co.* v. *Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (CA5 1998) ("With such a broad arbitration clause, it is only necessary that the dispute 'touch' matters covered by the [contract] to be arbitrable."); *Oldroyd* v. *Elmira Sav. Bank, FSB*, 134 F.3d 72, 77 (CA2 1998) (applying touch-matters test and holding that, because retaliatory-discharge claim touched upon matters covered by the employment agreement, it was within the scope of the agreement's arbitration clause).

inconsistent arbitrability standards should not continue and warrants the Court's attention.

Attempting to diminish the effect of conflicting arbitrability standards, respondents erroneously characterize the contract-reference test as cabined within Ohio and Kentucky, failing to even acknowledge the other state-court decisions cited in the petition as examples of the growing, contract-reference-test trend. See Pet. 11-12 (citing *Aiken* v. *World Fin. Corp. of S.C.*, 623 S.E.2d 873, 875, 876 (S.C. App. 2005), and *Loy* v. *Harter*, 128 S.W.3d 397, 403-405 (Tex. App. 2004)). Respondents include *Aiken* and *Loy* within a discussion of decisions declining to compel arbitration of non-breach-of-contract claims, Br. Opp'n 24, but they glaringly omit that these state courts used the contract-reference standard to deny arbitration in those cases. The South Carolina and Texas decisions, in conjunction with the Ohio and Kentucky decisions currently before the Court, confirm state courts' growing reliance on the contract-reference test and its constrictive effects on arbitrability of antitrust and other statutory claims.[2]

II. THE OHIO COURT'S CONTRACT-REFERENCE TEST CANNOT BE CHARACTERIZED AS MERE ANALYSIS OF THE ARBITRATION AGREEMENT.

Respondents erroneously attempt to deflect the Court's attention from Ohio's restrictive arbitrability standard by emphasizing that court's recitation of various bedrock

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[2] Respondents incorrectly suggest that the Court's denial of a petition for writ of certiorari four years ago in an unrelated case indicates that arbitrability-standard issues are generally inappropriate for review. See Br. Opp'n 27-28 (citing *UBS PaineWebber, Inc.* v. *Cohen*, 537 U.S. 974 (2002) (denying certiorari)). That denial, for whatever reason, obviously does not preclude the Court's consideration of the arbitrability issue in this case and, to the contrary, emphasizes the recurring nature of this kind of issue.

arbitrability principles that were not seriously at issue in the case. Br. Opp'n 1, 4-7, 13-18. That hollow recitation, however, cannot insulate from scrutiny Ohio's rule requiring that a cause of action reference the underlying contract to be arbitrable. The contract-reference test is not merely a tool for assessing the factual underpinnings of a claim, irrespective of its label, see, *e.g.*, Br. Opp'n 10, but a substitute for traditional arbitrability analysis, which focuses instead on the language in the arbitration agreement and whether a claim touches matter within the scope of that agreement. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.13 (1985).

The contract-reference test does not require a court to even look at the language chosen by the parties to define their agreement to arbitrate. Tellingly, in applying the contract-reference test, the Ohio Supreme Court conducted no analysis at all of the parties' arbitration agreements in reaching its holding. Lacking any textual analysis, the court of appeals had reasoned solely that the "allegations . . . neither relied on nor referred to a contract or a provider agreement between the doctors and the HMOs," App. 10a-11a, and the Ohio Supreme Court's affirmance of that decision expressly approved the propriety of the contract-reference test. App. 21a. The contract-reference test drove the court's decision, not the terms of the arbitration agreement.

A simple example highlights the difference. Even if the parties had written into their contract that they specifically agreed to arbitrate any state-law antitrust claims, the Ohio courts would have been free to disregard that agreement merely because the claims themselves made no reference to the contract. Although that kind of scenario is unlikely to present itself to a court because most arbitration agreements do not contain that kind of claim-specific language, the decisions that use the contract-reference test to deny

arbitration provide no means to enforce such a claim-specific arbitration agreement, except by using a different test.

Respondents attempt to cloak the contract-reference test's jettisoning of textual analysis with the authority of the Sixth Circuit's decision in *Fazio* v. *Lehman Bros.*, 340 F.3d 386 (CA6 2003), but *Fazio* faithfully analyzed the parties' arbitration agreement and relied on the touch-matters standard to compel arbitration under a broad agreement. The Ohio court's invocation of *Fazio*, as demonstrated in the petition, used a partial extraction of an excerpt of the *Fazio* holding to justify a conclusion that is completely at odds with both the form of analysis and holding of the Sixth Circuit. Pet. 12-13. And respondents offer no other basis to conclude that the Ohio court merely performed an arbitrability analysis guided by accepted principles of interpretation.[3]

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[3] Respondents attempt to sidestep the conflict caused by Ohio's adoption of the contract-reference test by offering two untenable, alternative justifications for the Ohio courts' refusal to compel arbitration in this case—neither of which were relied on by the courts below. First, they observe that two respondents are medical societies that are not signatories to a contract with United containing an arbitration agreement, Br. Opp'n 16—ignoring that respondents are primarily individuals who are signatories bound to arbitrate with United, which creates a live controversy regarding arbitrability. Moreover, the medical societies sued solely based on associational standing—that is, on behalf of individual member-respondents who are contractually bound to arbitrate with United. Second, respondents erroneously contend that the alleged price-fixing conspiracy predates some of the business relationships and, therefore, falls outside the arbitration agreements. Br. Opp'n 18. This argument ignores that the terms of the arbitration agreement are not limited to disagreements arising after the contract's execution but instead encompass "*any* disputes" about the parties' business relationship, with no temporal constraints. See, *e.g.*, *Mail-Well Envelope* v. *Int'l Ass'n of Machinists & Aerospace Workers, Dist. 54*, 916 F.2d 344, 348 (CA6 1990) (compelling arbitration of claims based on conduct prior to effective date of agreement because court lacked positive assurance that arbitration provision did not encompass such claims).

III. THE DOMESTIC ORIGIN OF RESPONDENTS' CLAIMS DOES NOT JUSTIFY THE OHIO COURT'S CONTRACT-REFERENCE TEST OR NEGATE THE RESULTING CONFLICT.

In an effort to minimize the sharpness of the Ohio court's conflict with other courts' routine recognition of the arbitrability of antitrust claims, respondents wrongly suggest that *Mitsubishi* was confined to international antitrust claims and that the arbitrability of domestic antitrust claims is an open question in the federal and state courts. Br. Opp'n 19-21. The Court's explicit extension of *Mitsubishi* to domestic antitrust claims in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 242-243 (1987), forecloses respondents' attempt to downplay the conflict represented by the Ohio decision and underscores the significance of the contract-reference test's exclusion of antitrust claims from arbitration. Moreover, the premise of respondents' contention that the contract-reference test does not conflict with antitrust-arbitration decisions rests on an outdated and discarded distinction between international and domestic antitrust contexts. In *Mitsubishi*, the Court rejected anti-arbitration rationales without any limitation to an international context. See 473 U.S., at 627, 632-637; see also *Nghiem* v. *NEC Elecs., Inc.*, 25 F.3d 1437, 1441, 1442 (CA9 1994). Respondents' characterization of the contract-reference test as a permissible approach to domestic antitrust claims, therefore, lacks any credible basis in law and cannot justify the Ohio court's departure from established FAA requirements and the arbitrability principles articulated by this Court.

IV. THE CONTRACT-REFERENCE TEST UNJUSTIFIABLY PRECLUDES ARBITRATION OF ANTITRUST CLAIMS.

In the face of courts' consistent recognition of the arbitrability of antitrust claims, respondents offer an uncontroversial—and irrelevant—observation that the arbitrability of antitrust claims ultimately depends on the governing arbitration agreement and that arbitration is not "*per se*" mandated for antitrust claims. Br. Opp'n 19-25. That is undoubtedly true, but respondents fail to engage the critical point that the contract-reference test effectively *per se* excludes antitrust claims from arbitrability, robbing governing arbitration agreements of any force.[4] The conflict identified by the petition is not whether antitrust claims always should be arbitrated—the focus of respondents' attention—but whether the contract-reference test permissibly precludes arbitration even when parties agree to a broad arbitration provision that reaches antitrust claims.

The contract-reference test has a particularly restrictive effect on the arbitrability of antitrust claims because they almost always can be pleaded without reference to the underlying contract, even if the allegations necessarily implicate the parties' business relationship. In this case, for example, respondents allege a price-fixing conspiracy that centers on the rates negotiated by the parties. As the Ohio dissenters correctly observed, App. 24a, that alleged conspiracy unquestionably involves the parties' "business relationship" and, therefore, falls within the scope of their

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[4] Respondents' extended discussion of *Coors Brewing Co.* v. *Molson Breweries* does nothing more than establish the unexceptional proposition that *Mitsubishi* does not mandate arbitration of all antitrust claims but, instead, requires courts to analyze the terms of the parties' arbitration agreement to determine whether an antitrust claim falls within its scope. 51 F.3d 1511, 1515-1517 (CA10 1995). That analysis of the language of the arbitration agreement never occurs under Ohio's contract-reference test.

agreement to arbitrate. And the soundness of that reasoning is confirmed by the Second Circuit's price-fixing arbitrability analysis in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163, 167 (CA2 2004).

Respondents unsuccessfully attempt to distinguish the specific conflict between the Ohio decision and *JLM Industries* by noting that the language of the arbitration agreements in the two cases was not identical. Br. Opp'n 25. The differences, however, are merely cosmetic—the two arbitration agreements both evidence the widest possible reach, eliminating any basis for a real distinction. Respondents also emphasize *JLM*'s international context, but the international and domestic contexts are utterly irrelevant to the arbitrability determination in both cases. Finally, respondents note the Second Circuit's cautionary comment about the touch-matters standard, but the court nevertheless used that standard to determine arbitrability. *JLM*, 387 F.3d, at 174.

The Ohio Supreme Court has joined several other states in applying a test that improperly disregards the language the parties used to define their agreement to arbitrate and, consequently, frustrates congressional intent in seeking to secure through the FAA a robust enforcement mechanism that would end, not encourage, judicial hostility to arbitration. A square conflict exists over the proper arbitrability standard, and the Court should resolve whether antitrust and other noncontractual claims can be subjected by state courts—or federal courts emboldened by the state-court trend—to a different arbitrability test.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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